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THE LAW
OF
BARON AND FEMME,

OF
PARENT AND CHILD, GUARDIAN AND WARD, MASTER
AND SERVANT,

AND OF THE
POWERS OF THE COURTS OF CHANCERY;

WITH AN ESSAY ON THE TERMS

HEIR, HEIRS, HEIRS OF THE BODY.

By TAPPING REEVE.

THIRD EDITION,
WITH NOTES AND REFERENCES TO ENGLISH AND AMERICAN CASES.

BY
AMASA J. PARKER AND CHARLES E. BALDWIN,
COUNSELLORS-AT-LAW.

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VERMONT DISTRICT COURT

PREFACE TO THE THIRD EDITION.

IT HAS been the object of the editors, in preparing this edition to furnish ample references to the statutes and decisions of the different states, so that the work shall present the condition of the law as it now exists in this country. In accomplishing this labor they have been very much aided by R. A. WIGHT, Esq., who was originally associated in the undertaking of preparing the notes, but found himself obliged to relinquish it on account of pressing professional engagements.

The radical changes recently made in the law of "Baron and Femme" by the legislatures of some of the states, together with the decisions that have been made under them, are fully referred to in the notes and necessarily occupy much space. These changes are still in progress, and for many years to come, the law on that subject will no doubt be in a "transition state." The result will probably be an entire revolution in the law affecting the rights and liabilities of married women.

The other subjects of this treatise have been but little affected by legislation in the different states. In regard to them the common law, generally, remains unchanged, except within the limits of judicial discretion, in applying well-established rules to new combinations of fact, and adapting them to the peculiar

institutions of the country. The cases referred to, fortunately, show great unanimity among the different courts, which could have been attained only by a proper respect for the judicial decisions of sister states, and a sincere desire to build up a system of American law, uniform and harmonious as well as just and beneficent.

ALBANY, *May* 20, 1862.

PREFACE TO THE SECOND EDITION.

THE value of the work of the late Judge REEVE on the legal character of the Domestic Relations is so generally recognized, that no apology will be demanded by the profession for its republication. Although it is now thirty years since its first appearance, it has not been superseded by any later treatise, and it still continues to be the standard work on the subjects of which it treats. Without claiming for it what can be ascribed to no elementary essay, the character of an *authority*, which can properly belong only to adjudged cases, we may nevertheless safely affirm, that it is the best existing exposition of those titles of the law, which it professes to discuss; and though subsequent legislation has, in many of the American states, changed the reciprocal rights and duties of the parties, yet it will be found that the author has in general correctly stated the principles upon which the common law has regulated those rights and duties, and to which American legislation concerning them has always had reference. The editor of the present edition, therefore, hopes that he is doing something towards the discharge of that debt, which, according to high authority, "every man oweth unto his profession," in presenting to his brethren a republication of Judge REEVE's original work, accompanied with as full notes

and references as the time and means of investigation at his command would admit. He has not ventured upon much discussion in those few cases where his own impressions, or the solemn decisions of legal tribunals, are adverse to the doctrines of the text, but has preferred rather to cite conflicting resolutions, and to refer to the books for the reasons which the sages of the law have given for judgments at variance with the conclusions of his author. The editor believes that the most late American statutory enactments, as well as most adjudged cases, bearing upon the subjects treated of by Judge REEVE, are referred to in his notes, and trusts that the work, in its present shape, will be found at least a tolerable digest of the American law of the domestic relations. It has been deemed advisable to reprint the treatise on the Powers of Chancery, and the essays on the legal import of the terms Heirs, &c., but there was not the same necessity for editorial labor in regard to them, and they are, therefore, given without annotation. In the multitude of bulky tomes, with which the legal press now teems, brevity is a merit, which may almost atone for the temerity of publishing at all, and this consideration has induced the editor to confine his prefatory and supplementary matter within the smallest limits consistent with general utility; and before he dismisses the work, he has only to acknowledge his indebtedness to the valuable labors of the Hon. JOHN BOUVIER, in his learned and excellent edition of Bacon's Abridgement, as well as to the various reporters of the American courts, whose cases are so often cited in the following pages.

BURLINGTON, VT., *October, 1846.*

PREFACE TO THE FIRST EDITION.

THE object of the Author of the following Chapters is, to bring into one connected view, the law on the various subjects respecting which they treat; which is found in the books, scattered through a great variety of Reports and Elementary Treatises.

He has had a particular view to the principles which govern each subject, and has endeavored to draw them from the various decisions which have been made, both at law and in equity. When the governing principle is discovered in any class of cases, it will assist in determining all analogous cases; and it will not be so difficult to decide correctly, when we meet with litigated questions. He has, therefore, in every *questio vexata*, viewed the governing principle as the pole-star. By this means, a desirable uniformity in the law will be observed; and its symmetry will be preserved from being marred.

He has not published this volume with the expectation of rendering any essential service to the Jurist. His utmost expectations will be answered, if it should be found beneficial to the learner. If the manner should partake too much of the character of instructing, he hopes for the candor of the reader, when it is known, that the work contains that which for many years has been delivered as lectures to pupils. His object has been, to

exhibit the Common Law of England, and such of their Statutes as we have adopted in words or principle. He has, therefore, but seldom mentioned the law of the State in which he lives, where it differs from the Common Law; unless that difference arises from causes equally operative in all parts of the Union; or where an explanation of it has, in his opinion, served the purpose of shedding light upon the Common Law. His design has been, to render the book, if of any value, equally valuable to all parts of our country.

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A N A C T.

Amending, and repealing parts of, the Act of 1860, of New York, concerning the rights of Married Women

PASSED MARCH 20TH, 1862.

SECTION 1. (Amending § 3, of Act of 1860.) Any married woman, possessed of real estate as her separate property, may bargain, sell and convey such property, and enter into any contract in reference to the same, with the like effect in all respects, as if she were unmarried, and she may in like manner enter into such covenant or covenants for title as are usual in conveyances of real estate, which covenants shall be obligatory to bind her separate property, in case the same or any of them be broken.

§ 2. The fourth, fifth, sixth, ninth, tenth and eleventh sections of the said Act are hereby repealed.

§ 3. (Amending § 7, of Act of 1860.) Any married woman may, while married, sue and be sued in all matters having relation to her sole and separate property, or which may hereafter come to her by descent, devise, bequest, purchase, or the gift or grant of any person, in the same manner as if she were sole; and any married woman may bring and maintain an action in her own name, for damages, against any person or body corporate, for any injury to her person or character, the same as if she were sole, and the money received upon the settlement of any such action, or recovered upon a judgment, shall be her sole and separate property.

In case it shall be necessary, in the prosecution or defense of any action brought by or against a married woman, to enter into any bond or undertaking, such bond or undertaking may be executed by such married woman with the same effect in all respects, as if she were sole, and in case the said bond or undertaking shall become broken or forfeited, the same may be enforced against her separate estate.

§ 4. (Amending § 8, of 1860.) No bargain or contract made by any married woman in respect to her sole and separate property, or any property which may hereafter come to her by descent, devise, bequest, purchase, or the gift or grant of any person (except her husband), and no bargain or contract entered into by any married woman in or about the carrying on of any trade or business, under any statute of this state, shall be binding upon her husband or render him or his property in any way liable therefor.

§ 5. In an action brought or defended by any married woman in her name, her husband shall not, neither shall his property be liable for the costs thereof, or the recovery therein. In an action brought by her for an injury to her person, character or property, if judgment shall pass against her for costs, the court in which the action is pending, shall have jurisdiction to enforce payment of such judgment out of her separate estate, though the sum recovered be less than one hundred dollars.

§ 6. No man shall bind his child to apprenticeship or service, or part with the control of such child, or create any testamentary guardian therefor, unless the mother, if living, shall in writing signify her assent thereto.

§ 7. A married woman may be sued in any of the courts of this state, and whenever a judgment shall be recovered against a married woman, the same may be enforced by execution against her sole and separate estate in the same manner as if she were sole.

§ 8. This act shall take effect on the first day of July next.

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REEVE'S DOMESTIC RELATIONS.

CHAPTER I.

BARON AND FEMME.

THE RIGHT WHICH THE HUSBAND ACQUIRES TO THE PERSONAL PROPERTY OF THE WIFE IN POSSESSION, AND TO HER CHOSSES IN ACTION.

THE husband, by marriage, acquires an absolute title to all the personal property of the wife, which she had in possession at the time of the marriage; such as money, goods or chattels personal of any kind. These, by the marriage, become his property, as completely as the property which he purchases with his money; and such property can never again belong to the wife, upon the happening of any event, unless it be given to her by his will; and in case of the death of the husband, this property does not return to the wife, but vests in his executors. (1)

(1) 2 Kent's Com., 143; Doct. & Stud., Dial., 6, c 7; Co. Litt., 351, b; Hyde v. Stone, (9 Cow., 230.) In Georgia, by statute, the real property of the wife, at the marriage, vests in the husband in the same manner as her personal property. (Stat., Georgia, 1785.)

The legislature may prescribe what interest the husband shall have in the acquisitions of the wife after marriage. Sleight v. Read & o'rs, 18 Barb., 159; Blood v. Humphrey, 17 Barb., 662; Vartie v. Underwood, 18 Barb., 561.)

The common law right of the husband to the wife's personal property during coverture is annulled in New York and most of the other states by statutes.

As this property is transferred by operation of law to the husband, it is to be remarked, that, as the case may be, such conveyance of her personal property in possession to the husband may operate injuriously to creditors; for, although it is true that the husband is liable to the creditors of the wife, yet his liability

Chap. 200, p. 307 of the Laws of 1848 of New York, provides, Sec. 1, That "The real and personal property of any female who may hereafter marry, and which she shall own at the time of marriage, and the rents, issues and profits thereof, shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property as if she were a single female."

§ 2. "The real and personal property, and the rents, issues and profits thereof, of any female now married, shall not be subject to the disposal of her husband, but shall be her sole and separate property as if she were a single female, except so far as it may be liable for the debts of her husband heretofore contracted."

Section 1 of the Act of 1849, amending § 3 of 1848, provides that "Any married woman may take by inheritance, or by gift, grant, devise or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise real and personal property, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband, nor liable for his debts."

Chap. 90, p. 157, of the Laws of 1860, of New York, in addition to the foregoing, provides that the property which any married woman "acquires by her trade, business, labor or services, carried on or performed on her sole or separate account," shall, notwithstanding her marriage, "be and remain her sole and separate property, and may be used, collected and invested by her in her own name, and shall not be subject to the interference or control of her husband, or liable for his debts, except such debts as may have been contracted for the support of herself and her children by him as her agent."

§ 2. "A married woman may bargain, sell, assign and transfer her separate personal property, and carry on any trade or business, and perform any labor or services on her sole and separate account, and the earnings of any married woman from her trade, business, labor or services, shall be her sole and separate property, and may be used or invested by her in her own name."

In Pennsylvania, it is provided that every species of property that may be owned by or belong to any single woman, shall continue to be the property of such woman after marriage, as fully as before, and all such property as shall accrue to a woman after marriage, by will, descent, deed of conveyance or otherwise, shall be owned and enjoyed as her separate property. Act of 11th April, 1848, Dunlop's Laws of Pennsylvania, 1124, 1125. Substantially the same provisions are made by the statutes of Massachusetts, General Statutes of Massachusetts, 1860, page 537, ch. 108, § 1. Compiled Statutes of Michigan, 1857, art. 16, p. 73, § 5. Revised Statutes of Maine, 1857, ch. 61. Statutes of Minnesota of 1849, 1858, p. 571, § 106. Revised Statutes of Wisconsin, 1858, ch. 95, p. 571, §§ 1, 2.

lasts no longer than the coverture; (a) as, if A should marry B, possessed of personal property to the amount of any sum, suppose it to be \$10,000, and B is at the same time indebted one half that sum, and should die before her creditors should collect their debts from the husband, the coverture is now at an end,

(a) 1 P. Wms., 468; 3 do., 400, 412.

In Iowa, the personal property of the wife does not vest at once in the husband on marriage, but if left under his control it will, in favor of third persons acting in good faith and without knowledge of the real ownership, be presumed to have been transferred to him, unless she file for record with the recorder of deeds, a notice stating the amount in value of such property, and that she has a claim therefor out of the estate of her husband,—and if he dies she will be deemed a preferred creditor. And she may file a notice with like effect in respect to specific chattels. Iowa Laws, 1860, p. 435, §§ 2499, 2500. Section 2504 of the same, provides that "In the case of bank stock, written securities, things in action, or other property which does not ordinarily pass by mere delivery or by oral contract without an indorsement, assignment or other written evidence of such transfer, knowledge of ownership of the wife will be presumed, unless such property has been conveyed to the wife by the husband.

In California, the real and personal property of the wife owned by her before marriage, and that acquired afterwards by gift, bequest, devise or descent, shall be her separate property, and all property both real and personal owned by the husband before marriage, and that also acquired as above, shall be his separate property. But all property acquired after marriage except as above, shall be common property. "The husband shall have the management and control of the separate property of the wife during the coverture, but no sale or other alienation of any part of such property can be made, nor any lien or incumbrance created thereon, unless by an instrument in writing signed by the husband and wife, and acknowledged by her on an examination separate and apart from her husband, before any judge of a court of record or a notary public."

Compiled Laws of California, 1850, 1853, ch. 147, p. 812, §§ 1, 2, and § 6, as amended in 1858, ch. 25.

In Alabama the property of the wife owned by her at the time of marriage, and whatever comes to her after marriage by descent, gift, demise or otherwise, is her separate property, but vests in the husband as trustee of the wife, and as such he may control and manage such separate estate without liability to account to the wife or her heirs, executors or assigns, for the rents, proceeds or profits thereof, but such property is not liable for the husband's debts. Statutes of Alabama, act of 1850, No. 23, amending § 1, of act of 1848.

In Texas, all property acquired by either husband or wife during the marriage except that which is acquired by gift, devise or descent, and the increase of all lands or slaves, is deemed the common property of the husband and wife, and during the coverture may be disposed of by the husband only. Such property is liable

and the husband is no longer liable to her * creditors; and as the \$10,000 was the only property that belonged to B, [*2] the creditors must lose their debts. So, if the husband had died at any time before the creditors had collected from him the debts due from the wife, the executors of the husband would not be liable; and, although it is true that the wife remains liable, after her husband's death, to the former creditors, as much as when she was a single woman, yet she might be utterly unable to pay them. I believe it will not be found, in any other case, that the property of one person is transferred to another, by operation of law, at the expense of creditors. (1.)

for the debts of the husband, and for those of the wife, contracted during the coverture for necessities, and upon the death of either, such common property goes to the survivor, if the deceased have no child or children, otherwise the survivor takes one-half of said property, and the other half passes to the child or children of the deceased. Digest, Laws of Texas, p. 312, act of 1848.

The acts of 1848, 1849, of New York, do not affect property which the wife possessed before those acts. The right, in such case being vested in the husband, could not be so defeated. *Crosey v. McKinney*, 30 Barb., 48; *Westervelt v. Gregg*, 12 N. Y. (2 Kern., 202); *Tlexan v. Wilson*, 48 Maine, 186.

Where a married woman purchases property on her own credit without charging her separate estate, if she had any, the title becomes vested in her husband, and the property is liable to be taken in execution for his debts. *Glann v. Younglove*, 27 Barb., 480.

The rents and profits of real estate, held in actual possession by a coparcener with the wife, belong absolutely to the husband, and he may maintain an action for them without joining the wife. *Dold v. Geiger*, 2 Gratt., 98.

The husband is entitled to the personal property of the wife which she has acquired while living apart from him in a state of adultery. *Agar v. Blethyn*, 2 Crompt., Mees. and Ros., 699.

He is also entitled to the wife's savings which accrued to her while living separate and apart from her husband. *Messenger v. Clark*, 5 Excheq., 388.

The property in possession must be held in her own right and not in *autre droit*,—as, if she were an executrix. Co. Litt., 337; and not as bailee of property. Ibid.; 2 Story, 312; Bacon's Abridg., Tit., Baron and Femme, § 3.

(1) An answer to these objections is attempted by Lord MACCLESFIELD, in the *Earl of Thomond v. the Earl of Suffolk*, 1 P. Wms., 469. Perhaps it may be hard, he observes, that the husband should be liable, during coverture, for the debts of the wife, accruing before; but we are to set against such hardship, that if the husband has received a personal estate with his wife, and happens not to be sued during coverture, he is not liable. He runs a hazard in being liable to the debts far beyond the personal estate of his wife, and in recompense for such hazard, he is entitled to

It will be observed, that the husband's liability to pay the debts of the wife does not depend upon the fact that he received property by her: if that were the ground of his liability, he would be liable to the extent of that property, and no further. (1) The truth is, he is as liable to pay the debts of his wife, when he receives no property with her, as when he does; and the circumstance of his having received property from her does not increase his liability; neither does the circumstance of his not having received property from her diminish his liability; nor is his liability founded upon the idea that he is a debtor; for, if he was considered as a debtor, he would remain liable after the death of the wife, and, on the event of his dying before his wife, his executor would be liable. But this is not the case; but, on the contrary, she is considered as the debtor; and for this reason it is, that the wife must be sued with the husband, to recover a debt contracted by her before marriage, which would not be the case if the husband were considered as the debtor. If the debt

her whole personal property, though exceeding the amount of her indebtedness, and is discharged from her liabilities as soon as the coverture is ended.

The question was raised in this case whether the husband who marries a *femme sole* trader, is liable for her debts after the coverture is at an end; but the court were unanimously of opinion that he was not. The same question was afterwards presented in *Heard v. Stamford*, 3 P. Wms., 410, and the decision in the former case approved of.

In order to charge a wife as *femme sole* trader in South Carolina, it is sufficient to show that she acted, and has been considered as such. *Hobart v. Lamon*, 3 Rich., 131. The business of keeping a boarding-house is one as to which a *femme covert* may become a *femme sole*. *Dial v. Neuffer*, 3 Rich., 78. In New York, Massachusetts, and some other States, the wife may carry on business in her own name, and for her own benefit, and the husband will not be liable for her debts contracted in such business. General Statutes of Mass., chap. 108, sec. 3; Laws of New York, 1860, ch. 90, sec. 2.

(1) The statutes of Indiana (vol. I, R. S. of Indiana, 1852, ch. 52, p. 320, § 1,) provides that "in all marriages hereafter contracted, the husband shall be liable for the debts and liabilities of the wife contracted before marriage, to the extent of the personal property he may receive with or through her, or derive from the rent or sale of her lands, and no further." *Adair v. Shaw*, 2 Sch. & Lef., 263. By an act passed in the State of New York, July 18, 1853 (Sess. Laws of 1853, p. 1057), the husband is made liable for the debts of the wife contracted before marriage only to the extent of the property of the wife acquired by him by the marriage or by ante nuptial contract.

had been transferred to the husband, it would not, on his death, have revived against the wife; but it does revive against her; this is perfectly consistent with the idea that she is considered by law as the debtor. (1)

*The ground, on which the husband is joined with the wife, is this: the wife, by marriage, is entirely deprived of [*3] the use and disposal of her property, and can acquire none by her industry. If, therefore, the suit could be maintained against her alone, she might be imprisoned, and would be wholly destitute of the means of extricating herself from confinement, depending solely on the good will of her husband to pay the debt, and thus procure her release. The law would not trust to the caprice of husbands, and therefore has provided, not only that the husband must be sued with the wife, on a debt due from her, but has also provided that the wife shall not be imprisoned without her husband. Whether the liberty of the wife would be a sufficient inducement to every husband to pay the debt, and obtain her release from imprisonment or not, there need be no question; but the obtaining of his own liberty would be a motive sufficient to influence him to pay the debt, in consequence of which his wife would be released from imprisonment. (2) It is the interest of the wife that is respected. If it were for the sake of the creditor, that the law had made this provision, the liability of the husband to pay her debts would have continued after the coverture was ended, when the wife was dead, or had been dis-

(1) 2 Kent's Com., 145; Woodman v. Chipman, 1 Camp. R., 189, and S. C. in notes.

(2) In several of the States, no female can be imprisoned on execution for debt; but this does not in the slightest degree alter the liability of the husband for the wife's debts. Rev. Stat., Vt., 1839; Laws of Penn., 1819; Laws of Miss., by Alden & Van Hoesen, 1839; Stat. of Ct., 1838. But it is not precisely true that a wife may never be imprisoned without her husband. She may not upon *mesne process*, but when they are both taken in execution, and the husband is discharged under the insolvent acts, the wife will not be discharged, if she is possessed of property not mentioned in the acts of insolvency. Commonwealth v. Badlam, 9 Pick., 362; McKinstry v. Davis, 3 Cow., 339; Sparks v. Bell, 8 Barn. & Cress., 1; see also De Gaillon v. L'Aigle, 1 Bos. & Pul., 8; Burfield v. the Duchess de Pienne, 2 New Rep., 380; Cooper v. Hunchin, 4 East., 521; Doe dem. Taggart v. Butcher, 3 Maul. & Sel., 557; Chalk v. Deacon, 6 Monr., 114; Vanderheyden v. Mallory, 1 Comst., 452.

abled from paying her debts by means of her property having been transferred to her husband by operation of law.

The husband's title to his wife's personal property in action, to which she was entitled at the time of the marriage, as bonds, notes, contracts, and her right to damages for injuries, &c., is not as extensive as his right to her personal property in possession; he may absolutely dispose of them at pleasure; he may sue and collect them in his own name and in the name of his wife, and, when collected, the avails are absolutely his. (a) (1)

When a contract is made with a femme sole, that, if she marry and survive* her husband, a sum of money shall be paid to her, or any other thing be done for her benefit, and [*4] she marries; the husband cannot discharge this contract. (b.) If the husband empower another to receive the money due on such choses, and he actually does receive it, although it has not

(a) 1 Roll. Abr., 343; 3 do., 407.

(b) Yel., 156; Cro. Jac., 222; 1 Salk., 227; Brownl., 15; Palm., 30.

(1) But reduction into possession, by a husband, of a wife's choses in action, is not in all cases conclusive, though it is *prima facie* evidence of a conversion to his use; but the presumption of intent may be repelled by proof that he held the money as her trustee, for which he would be accountable. *Hind's Estate*, 5 Whart., 138.

If a husband take possession of his wife's property as administrator, and not as husband, such a possession will not bar her right if she survive him. And so, if he receive her money as a loan, the wife's survivorship will still remain. *Gochenaur's Estate*, 23 Penn., 460; *Gray's Estate*, 1 Penn., 328. It is sometimes an important question, as to what constitutes a *reduction to possession*. It is held, that the mere actual possession of the instrument is not a reduction to possession of the wife's choses so as to bar her survivorship. *Latourette v. Williams*, 1 Barb., 9; *Hall v. Young*, 37 N. Hamp., 134. Held also, in *Barber v. Slade* and others, 30 Vt., 192, that the husband must do some positive act to constitute a reduction to possession. And Justice STRONG very aptly remarks, in the case of *Tritt's Adm'r v. Colwell's Adm'r*, 31 Penn., 233, "that that *reduction to possession* that made the chose absolutely as well as potentially the husband's, was a reduction into possession not of the thing but of the title to it." Consequently his legal assignment of her chose in action barred the wife's survivorship, for it took away her legal title upon which alone that right rested. See also *Holmes v. Holmes*, 2 Wms. (28 Vt.), 765; *Barber v. Slade*, 30 Vt., 191.

The right of a husband to reduce to possession his wife's choses cannot be exercised by a guardian appointed over him as an insane person; but the property continues vested in the wife. *Andover v. Merrimack County*, 37 N. Hamp., 438.

come to the hands of the husband, this is considered as collecting it. The husband may assign such choses, and the assignment is valid. It must, however, be remarked, that although a husband can assign the choses of his wife, yet his power in this respect is limited; for, to render such assignment valid against a surviving wife, it must be for a valuable consideration. 2 Atk., 207, 417; 1 Brow. Cha., 44. (1)

Although by marriage the personal property of the wife, if in possession, vests in the husband, and, if in action, is at his disposal; yet, if the husband by articles agree, that the legal title of the wife's portion should remain in the executor of her father, from whom it came, until a settlement should be made upon her of certain other lands, as her jointure, and he dies

(1) The power of the husband to assign the wife's choses in action for a valuable consideration, and the doctrine that such assignment bars her of her right of survivorship in the thing assigned, but subject, nevertheless, to her equity, are recognized by numerous decisions. *Carteret v. Paschal*, 3 P. Wms., 197; *Johnson v. Johnson*, 1 Jac. & Walk., 456; *Jewson v. Moulson*, 2 Atk., 417; *Salisbury v. Newton*, 1 Eden, 370; *Mitford v. Mitford*, 9 Ves., 87; *Russell's Rep.*, 65; in notes; *Schuyler v. Hoyle*, 5 John. Ch. Rep., 196; *Kenney v. Udall*, 5 John. Ch. Rep., 464; and see S. C. affirmed in the Court of Errors, 3 Cow., 590; *Krumbaar v. Burt*, 2 Wash. C. C. R., 406; *Lodge v. Hamilton*, 2 Serg. & Rawle, 325; *Ashley v. Ashley*, 1 Collyer, 553; *Ellison v. Elwyn*, 13 Simons, 309.

In *Siter's case*, 4 Rawle's R., 479; an assignment of the wife's choses was sustained, not on the ground of a valuable consideration, moving to the husband, but because the assignment was for the benefit of the wife and her child. This was held to be a reasonable anticipation, by settlement, of a provision for the wife's equity, and valid in equity, though the fund was not reduced to possession before the execution of the assignment. But the consideration must, in general, be a valuable one, for, beyond the consideration, the assignment will not bar the wife, if she survive. *Searing v. Searing*, 9 Paige, 283; *Saddington v. Kinsman*, 1 Bro. Ch. Rep., 44; *Stamper v. Barber*, 5 Madd., 157; *Wright v. Rutter*, 2 Ves., 673; *Johnson v. Johnson*, *wb. sup.*; *Cassell v. Carroll*, 11 Wheat, 134; *Hartman v. Dowdel*, 1 Rawle's Rep., 279; and as to the general effect of these assignments in equity, see notes, page 9, *infra*.

Held, in *Tritt's Adm'r v. Colwell's Adm'r*, 31 Penn., 228, that the assignment must be for a valuable consideration. See, also, *Webb's Appeal*, 21 Penn., 248; *Smilies Appeal*, 22 Penn., 130; *Westervelt v. Gregg*, 12 N. Y. (2 Kern.), 202.

An assignee for value, without knowledge that a former assignment was made without consideration, the instrument expressing value, is entitled to the bond or its proceeds against the claims of the wife after obtaining a divorce. *McConnell v. Wenrich*, 16 Penn., 365.

without settling such jointure, and no such lands are to be found: in such case, his agreement aforementioned prevents her portion from ever vesting in him, but the legal title remains in the executor, as trustee for the wife, and she shall have her portion. 1 Ves., 876. (1)

If the husband does not dispose of her choses, during coverture, he cannot dispose of them at all, for he cannot devise them; and if he die before any disposal of them, they will go to the wife, if she be living, and if she be dead, they will go to her representatives. (2)

(1) Where there was a parol agreement between husband and wife, before marriage, that the wife's property should remain to her sole and separate use, it has been held that it will belong to her on the death of the husband, notwithstanding it may have come into his possession during coverture, and been again put out on securities taken in the name of the wife. *Flowers v. Kent*, Brayt. Vt. Rep., 238; and where in such a case, upon a sale of the property of the wife, after marriage, a note was executed to husband and wife, by the purchaser, it was held that the note survived to her on the death of the husband, and not to the husband's administrator. *Richardson v. Daggett*, 4 Vt. Rep., 336.

(2) *Coke's Litt.*, 351, a; *Legg v. Legg*, 8 Mass. Rep., 99; *Howes v. Bigelow*, 13 Mass., 384; 2 Conn. Rep., 563; *Lodge v. Hamilton*, 2 Serg. & Rawle, 493; *Smith v. Scudder*, 11 Serg. & Rawle, 325. In the case of a divorce, a *vinculo matrimonii*, such choses remain the property of the wife. *Legg v. Legg*, *Lodge v. Hamilton*, *sub. supra*; but not in the case of divorce, a *mensa et thoro*. *Dean v. Richards*, 5 Pick., 461. Where a legacy was left to a married woman, whose husband had deserted her, and from whom she was subsequently divorced, a *vinculo*, without his having reduced it to possession, it was held that she was entitled to the legacy. *Wintereast v. Smith*, 5 Rawle, 182. A note, payable to a *femme covert*, for a debt due to her while sole, is legally payable to the husband, and the property vests absolutely in him, and after his death, goes to his executor or administrator, and not to the wife. *Shuttleworth v. Noyes*, 8 Mass. Rep., 229. Such, however, seems not to be the doctrine in Vermont. In *Richardson v. Daggett*, 4 Vt. Rep., 336, where, on a sale of property belonging to a *femme covert*, a promissory note was executed to her and her husband, during coverture, for the purchase money, it was held that the note survived to the wife on the death of the husband. *PHILPS, J.*, in delivering the opinion of the court admits that the decisions on this subject have been somewhat fluctuating, and bases his decision on the case of *Schoonmaker v. Elmendorf*, 10 John., 49, and *Draper v. Jackson*, 16 Mass., 480; and also upon the fact that a court of chancery would treat the note as the separate property of the wife.

This latter reason seems not to be a very forcible one, for it by no means follows, that a court of law should extend its protection to a party, because he would be

Where, for a valuable consideration, there is, by the contract of the husband, a specific assignment of the wife's chattels, or of a specific part of her equitable property in chattels; or where there is an agreement by the husband to assign, which in* equity is considered as equivalent to an actual assignment; [*5] the wife has no right of survivorship. *Bates v. Dundas*, 2 Atk., 9 Mod., 42; 6 Ves., 885. (1)

entitled to it in chancery. But however this may be, the case of *Richardson v. Daggett* is undoubtedly conclusive upon the subject in Vermont.

The right of a widow to the personal estate of her husband until a division thereof is a mere chose in action, and if she marries again and her husband does not reduce the same to possession, the right will survive to her on his death *Harper v. Archer*, 8 Sme. & Marsh, 229; *Clerk v. McCreary*, 12 Ibid., 347.

So also a promise made to a married woman, in consideration of the sale of her real estate, is a chose in action, which will survive to her unless reduced to possession by the husband during coverture. *Drigg's Adm'r v. Abbott*, 27 Vt., 580.

Where an obligation or contract is taken to the husband and wife, or to the wife alone with the assent of the husband, the action survives to the wife. In such case, says GARDNER, J., "the form of the security implies a design to benefit the wife, and the law will give effect to that intention when the interest of creditors is not affected." *Borst v. Spelman*, 4 Comst. (N. Y.), 284; *Prindle v. Caruthers*, 15 N. Y. (1 Smith), 425.

And it was held in *Boozer v. Addison*, 2 Rich. Eq. R., 273, that a sealed note given to a wife for her separate earnings during coverture survived to her on the death of her husband, he not having laid any claim to it.

(1) *Mumford v. Murray*, 1 Paige, 620; but an assignment by the husband of the wife's choses in action, as a collateral security, does not deprive her of her right of survivorship, in case he dies before they are reduced to possession. *Hartman v. Dowdel*, 1 Rawle, 279. But where a husband conveyed his wife's choses in action to trustees, for the benefit of the wife and her child, it was held that this passed the wife's interests to the trustees upon the trusts. Siter and another, Guardians of Jordon, 1 Rawle, 468. Where the husband assigned the wife's reversionary chose, and survived the person upon whose life the reversion depended, but died without actually reducing it to possession, the assignment was held to be void against the surviving wife. *Ashley v. Ashley*, 1 Collyer, 553; *Ellison v. Elwyn*, 13 Simons, 309.

See also *Tritts' Adm'r v. Colwell's Adm'r*, 31 Penn., 234. The law seems to be well settled that, in those States where special enactments do not secure to the wife her property which she owns at the time of marriage, and also what accrues to her afterwards during coverture, as her sole and separate property independent of her husband, legacies and distributions accruing to the wife during coverture, if reduced to possession during coverture, become the absolute property of the husband. 2 Kent's Com., 136; *Flory v. Baker*, 2 Penn., 470; 2 Story Eq., 631. So also whether accruing to her before or during coverture, as the meritorious cause.

If the assignment of the husband be of a general nature, though for a valuable consideration, and the assignees have not collected it; such assignment will not bar her right of survivorship.

Where there is a voluntary assignment by the husband of the trust of a term belonging to the wife, without consideration, it will bar her of her right of survivorship. 3 P. W., 196. Where such voluntary assignment by the husband is without consideration, and is of a wife's chose, or equitable interest, not the trust of a term, it will not bar her of her right of survivorship. 2 Vern., 401; 2 Ves. 675; Pre. in Ch., 419. By these authorities the question is put at rest, notwithstanding a different opinion given in 1 P. W., 378. The husband has power to assign a mere possibility in a chose, as well as her present interest. 9 Mod., 101; 2 P. W., 607; 1 Anstr., 34. (1)

Curry v. Faulkners, 14 Ohio, 100; *Dixon v. Dixon*, 18 Ohio, 115; *Short v. Moore*, 10 Vt., 450; *Parsons v. Parsons*, 9 N. H., 309.

Held, in the case of *Westervelt v. Gregg*, 12 N. Y. (2 Kern.), 202, that the husband had a vested right in a legacy bequeathed to his wife before the act of 1848, securing property to married women, although the legacy was not reduced to possession when that act took effect. And if the husband, who has survived his wife, dies before he has recovered the choses, his representatives are entitled to them. See also cases there cited.

(1) The effect of such an assignment of the wife's choses, for a valuable consideration, is now generally understood, with this limitation; that the property so assigned is subject to the wife's equity, for her reasonable support. 2 Kent's Com., 137, and cases there cited. The later decisions of the English Chancery Courts, upon the general effect of such assignments, go much further toward protecting the interests of the wife, than the older cases. In *Honner v. Morton*, 3 Russell's Rep., 65; *Pardew v. Jackson*, 1 Ibid., 70; and *Hornby v. Lee*, 2 Madd. Ch. Rep., 16; it is said that the husband's assignment of the wife's reversionary interest will not bar her right as his survivor, provided the interest continues reversionary to his death. In *Mitford v. Mitford*, 9 Ves., 87, the soundness of the rule that the husband's assignment, for a valuable consideration, passed the wife's chose in action, freed from her contingent right of survivorship, was strongly questioned on the ground that the assignee could not take a greater right than the husband had. Sir Wm. Grant, however, admitted in that case, that a distinction must be recognized between assignments in bankruptcy, or by operation of law, and a particular assignee for a valuable consideration. In *Pardew v. Jackson*, the doctrine is carried to a far greater extent, for it is there held that all assignments made by the husband of the wife's outstanding personal property, not then reduced to posses-

When a husband becomes bankrupt, her choses are, by law, assigned to commissioners; therefore it is that, not only his own debts are discharged under the commission, but the debts which his wife owed, *dum sola*. (1) The principle on which the deci-

sion, including assignments in bankruptcy, or under an insolvent act, passed only the husband's interest, subject to the wife's legal right of survivorship, and that the husband could not possibly make an assignment of the reversionary interest of his wife, so as to bar her as survivor, provided the interest continued reversionary. A very late case also in England goes nearly the same length. *Ashley v. Ashley*, 1 Collyer, 553. Again, in *Morley v. Wright*, 11 Ves., 19, these former propositions were in a measure recognized, especially the one that the husband could convey no more right by his assignment than he had to reduce the wife's outstanding interest to possession, subject to the "wife's equity." This doctrine is most explicitly affirmed in *Honner v. Morton*, but in this case a distinction is taken between the case in which the husband had an immediate power of reducing the chose into his possession, and where he had not. In the first case the assignment would be regarded, in equity, as the actual reduction of the property into possession, and a consequent transfer, for he had the power to do so, and the transfer amounted to an agreement to do it.

Several of the older cases are directly repugnant to the doctrine of these decisions. In those it has been held that a contingent interest, or the possibility of a term, or a specific possibility of the wife's, might be assigned by the husband for a valuable consideration, so as to bind the wife. *Gray v. Kentish*, 1 Atk., 280; *Bates v. Dandy*, 2 Atk., 206; *Hawkins v. Obyn*, *Ibid.*, 549; *Chandos v. Talbot*, 2 P. Wms., 601.

If a husband appoint an attorney to receive a debt or legacy due to his wife, and the attorney receive that money, or if the husband mortgage the wife's interest, or if he recover it in a suit at law, in his own name, or release the debt, in these cases, the right of survivorship of the wife ceases. *Schuyler v. Hoyle*, 5 John. Ch. Rep., 196; see also *Forest v. Warrington*, 2 Desaus., 254, 261.

But the consideration for the assignment must always be a valuable one, for a mere voluntary assignment in no case binds the wife. *Mitford v. Mitford*, 9 Ves., 87; *Jewson v. Moulson*, 2 Atk., 420; *Johnson v. Johnson*, 1 Jac. & Walker, 456; *Saddington v. Kinsman*, 1 Bro. C. C., 44; *Hartman v. Dowdel*, 1 Serg. & Rawle, 279.

Held also in Pennsylvania, before the act of 1843, that a voluntary assignment for the benefit of creditors would not pass the legacy of the wife nor her chose in action. *Skinner's Appeal*, 5 Penn., 262; *Helfrich v. Obermyer*, 15 Penn., 113. And an assignment of a wife's chose, pending proceedings for a divorce, being voluntary and for the mere purpose of barring her right of survivorship, made by a husband who has deserted his wife, does not divest her title. *Knapp v. Scholl*, 10 Penn., 193.

(1) It has been considered as well established law, that an assignment in bankruptcy will, of itself, bar the wife's contingent right of survivorship in her chose in action. *Miles v. Williams*, 1 P. Wms., 249; *Bosvil v. Brander* *Ibid.*, 248; *Mitchell v.*

sion is founded, cannot be that her debt is his, for if that were the case, he, or his executor, as the case might be, would be liable for her debts after coverture was at an end. The court manifestly proceeded upon the ground, that debts due to her, and debts due from her, should fall under the same consideration; and it was by the statutes of bankruptcy, a point settled, that all the debts due to her were assigned to commissioners, so that all possible chance of her reaping any benefit from choses due to her, on the contingency of the coverture ending before they [*6] were reduced to possession by her husband, was gone. 1 P. Wms., 249. It was* thought reasonable, that all liability for debts due from her should also by the same act be at an end.

The opinion on which this rule is founded is incorrect, for such choses may survive. The rule as to the right of the wife, by survivorship, to the chattels of the wife assigned by the bankruptcy of the husband, is this: If the husband die before the assignees have reduced them to possession, they will survive to the wife; for the assignees possess the same rights as the husband before bankruptcy, and no other; and if he had died before he became a bankrupt, and had not reduced her chattels to possession, they would have survived to the wife. There have been two decisions contradictory to this rule. See 1 P. W., 458; 3 Ves., 617. But the current of authorities is in accordance with the rule here laid down. In 1 Atk., 280, the same doctrine is recognized as correct. In 1 Bro. in Chan., 44, and again in 50, the 2d note, and in a later case, the 9th of Vesey, 87, this point was decided, and I trust settled. In this case the wife was entitled to a legacy on the decease or marriage of A. Her husband, in 1784, became a bankrupt, by which means the legacy, by operation of law, was assigned to the assignees of her husband. In 1789, A. married, and in 1790, the husband

Hughes, 6 Bing., 689. But see *Pardew v. Jackson*, cited in preceding note, where, in chancery, it was held that the wife's equity still subsisted under such an assignment.

It was held in New York that a discharge of the husband under a bankrupt law, was no discharge of the wife, but that after coverture was ended she would be liable for her debts contracted *dum sola*. *Vanderheyden v. Mallory*, 1 Comst. (N. Y.), 463.

died, and the legacy was not collected; the assignees claimed the legacy; the master of the rolls decided in favor of the wife, as he said, both on principle and precedent, and decreed that the legacy, with the dividends thereon from the husband's death, should be paid to the wife. (1)

In equity the husband is considered as a purchaser of the wife's choses, where the husband has made a competent settlement on the wife before marriage, exclusive of a jointure. A jointure is not a purchaser of her choses, for that comes in lieu of dower. 2 Vea., 501, 502; Ca. temp. Tal., 168. (2)

*In a case, 2 Vern., 6, a question was made, whether the [*7] executor of a husband is entitled to the choses of the wife, on the death of the husband, who had settled on her a competent jointure; it was determined, that they belonged to the wife. The distinction, I apprehend, is this: that when an estate is settled as a jointure, it bars dower, but never operates as a purchase of the choses of the wife by the husband; but any other adequate settlement, not a jointure *eo nomine*, will not bar the wife of dower, but may operate as a purchase of her choses.

Where the choses of the wife are purchased, her right of survivorship is at an end. As to what constitutes a purchase, there seems to be a discordance of opinion among judges. Some things are clear. If there be a marriage settlement, in which it is declared to be in consideration of the wife's fortune, this is a purchase of her choses, but no bar of her dower; if it be confined to a particular part of her fortune, it cannot be extended further. If this settlement is denominated a jointure, it is a bar to her dower, and may be also a purchase of her fortune, if it be so expressed in the settlement. But her future fortune will not be purchased, unless the words of the settlement extend to the future fortune. A marriage settlement was executed by the

(1) The rule, as stated in the text, has been recognized as correct, by courts of high authority, both in England and the United States. *Mumford v. Murray*, 1 Paige Ch. Rep., 620; *Van Epps v. Van Deuzen*, 4 Paige Ch. Rep., 64; *Pierce v. Thornley*, 2 Simons, 167. Voluntary assignments for the benefit of creditors, held not to pass wife's chose in action. *Skinner's Ap.*, 5 Penn., 262; *Halfbrich v. Obermyer*, 15 Penn., 113.

(2) *Bray v. Dudgeon*, 6 Munford, 133.

husband, in which it was not expressed to be a purchase of the wife's fortune. Lord ELDON lays down the rule, that the settlement for that purpose must express it to be in consideration of the wife's fortune, or the contents must import it as clearly as if it were expressed. 6th Ves., 888; Amb., 672. This is a very different rule from that laid down by Lord Keeper WRIGHT, when he says, the law of this court will presume a promise, in all cases where a settlement is equivalent, that the husband shall have the wife's portion. And so he decreed, in a contest between the executor of the husband and the surviving wife. If we attend to the language* of the more early decisions on this subject, we shall find that this decision was in accordance with them, while the more modern decisions are agreeable to the aforementioned opinion of Lord ELDON. The settlement which is sufficiently efficacious to purchase the wife's fortune, however it may be expressed, must, in the opinion of the court, be adequate for that purpose; 2 Ver., 501; Pre. in Chan., 68; 5 Ves., 587. (1.)

(1) By the latter cases, it is well settled that in order to make the husband a purchaser of his wife's fortune by settlement, and prevent her right of survivorship, the settlement must clearly import that it is made in consideration of her fortune; and he will not be entitled to any future accessions, unless the settlement appear to have been made in consideration of the property, to which she *might* become entitled, as well as that which she then had. *Garforth v. Bradley*, 2 Ves., 675; *Druce v. Dennison*, 6 Ves., 385; *Salway v. Salway*, Amb., 692; *Mitford v. Mitford*, 9 Ves., 87; *Carr v. Taylor*, 10 Ves., 578.

If the husband, on his part, covenant to settle a sum of money, he will not be a purchaser of his wife's fortune, while that covenant remains unperformed, and neither he nor any person claiming under him, will be permitted to receive any part of her future property upon any other condition, but that of making good the settlement. *Mitford v. Mitford*, 9 Ves., 87. And it appears that if the settlement were made in consideration of her fortune, without saying more, it entitles the husband to all her *then* personal property, but not such as afterwards accrues to her. Otherwise, if it appears that it was the agreement between the parties, that he should have, not only her then present, but all subsequently acquired personalty; and of course when any of her choses in action, are not purchased by settlement, they will be subject to her rights of survivorship. *Barton v. Dean*, 2 Ves., 607; *Elibank v. Montolieu*, 5 Ves., 737; *Mitford v. Mitford*, *ub. sup.*; *Carr v. Taylor*, 10 Ves., 574; *Beresford v. Hobein*, 1 Madd., 371; *Lodge v. Hamilton*, 2 Serg. & Rawle, 493.

Choses in action, and other property, to which the wife becomes entitled during coverture, are liable to the claims of the creditors of the husband; and a settlement thereof upon the wife, with the assent of the husband, before being reduced into

The anxious solicitude of our law to preserve the rights of the wife unhurt, is manifested by this rule. The wife before marriage is indeed *sui juris*, capable of contracting, and competent to take proper care of her own concerns. Yet it is not supposed that a female, unaccustomed to bargains, in the moments of her warm confidence in the honorable and generous intentions of her suitor, will always sufficiently guard her rights. The law has, therefore, taken care that such confidence shall not be abused. The rules before mentioned, by Lord Keeper WRIGHT and Lord ELDON, are directly opposed to each other. Since it is perfectly easy to insert in the marriage settlement, that by it the wife's fortune was intended to be purchased, and we find nothing of this nature therein, it is not easy to conceive why we ought to infer an intention to purchase. Surely it is nothing strange that the husband should wish to make a greater provision for his wife than her uncollected choses would afford to her. If it was opposed to constant experience, that a provision should be made by a husband for a wife, unless the choses of the wife were absolutely his, we might then infer that such a settlement was a purchase of the choses of the wife. But every day's practice proves the contrary, and leaves no room for the Lord Keeper's inference.

Where there are articles of agreement to settle an estate on his wife, in consideration of a portion received by the husband, and soon after the marriage the wife dies, so* that no settlement is made, the articles are a purchase of her uncollected portion, and shall go to the husband and not to the administrator.

If a husband cannot recover the choses of his wife, without the intervention of a court of equity, as where the legal title is in trustees, such court will refuse to lend him any aid, unless he has made a previous decent provision for his wife, or has agreed to make one out of the property sued for. 3 P. Wms., 302. But if the wife will appear in court, and waive all claim to a provision, the court will generally dispense with this rule, but not

possession, will not protect such choses in action, or other property, from such creditors. *Dold v. Geiger*, 2 Gratt., 98.

always, as where anything takes place which raises a suspicion that the waiver was not freely made by the wife. 2 P. Wms., 641; 3 Ibid., 12; Tothill, 179; 2 Ves., 699, 579. (1)

(1) To afford the wife a reasonable provision, out of her property, for her own support, and that of her children, seems to be a prominent feature in all the late equity decisions, in those cases which relate to the husband's rights over her property in action.

According to the doctrine of the text, if he asks the aid of a court of chancery to give him the control of the wife's property, such court will withhold its assistance until he has made an equitable provision out of it for her and her children; and further than this, perhaps, chancery would restrain him from proceeding at law until he has made such provision. It certainly will restrain him from proceeding in the ecclesiastical court, for the recovery of the wife's legacy, until such provision is made, and it is difficult to assign any reason why a suit at law ought not equally to be restrained. 2 Atk. Rep., 419. The following cases seem to place the doctrine of the text beyond question: Howard v. Moffat, 2 John. Ch. Rep., 206; Duvall v. Farmers' Bank of Maryland, 4 Gill & John., 282; Whitesides v. Dorris, 7 Dana's Rep., 106; Perryclear v. Jacob, 2 Hill's S. C. Ch. Rep., 509; Like v. Beresford, 3 Ves., 506; Kenney v. Udall, 3 Cow., 590; Duryee v. Browyer, 2 McCord's S. C. Ch. Rep., 368; Haviland v. Bloom, 6 John. Ch. Rep., 178; McElhatten v. Howell, 4 Haywood, 19; Pinney v. Fellows, 15 Vt. Rep., 525.

This equity, however, is personal to the wife, for, if she die in her husband's lifetime, though she leave issue capable of inheriting, the husband is entitled to her personal property, without making any provision for them. Scriven v. Tapley, Amb., 599; Phipps v. Earl of Anglesea, Fonbl. notes on Eq. Tr., 89; Murray v. Ellbank, 10 Ves., 84; Lloyd v. Williams, 1 Madd., 450; but see 13 Ves., 87. If the wife dies after a decree for carrying in proposals for a settlement to the master's office, the right of the children attaches. Reeve v. Jackson, 2 Dick., 604; De la Garde v. Lempiere, 6 Beav., 344. And it has been held that the wife's equity attaches on her filing a bill for a settlement, and that the children are entitled if she afterwards die. Stienmetz v. Halthin, 1 Glyn. & Jam., 68. If the wife is the subject of a State by the law of which the husband is entitled to the whole property, the court will not require a settlement to be made on her. Sawyer v. Shute, 1 Anst., 63; Campbell v. French, 3 Ves., 321; Dias v. Smith, 1 Roper, 265.

The following authorities are against the position, above referred to, that a court of equity will restrain the husband from proceeding at law until he makes such provision, and, although emanating from high sources, they have not as good reasons for their support as the opposite doctrine. 1 Ves., Sen., 539; 2 Atk., 420; 10 Ves., 90; Howard v. Moffatt, 2 John. Ch. R., 206; Glen v. Fisher, 6 John. Ch. R., 33; Dumont v. Magee, 4 John. Ch. R., 318.

But equity will protect the rights of the wife, whether the application for the control of the property be by the husband, or his representatives or assignees, or the wife or her trustees. Kenney v. Udall, 3 Cow., 590. The courts of Pennsylvania do not possess the power of protecting this equity of the wife. Yohe v. Bar-

The court will generally allow the husband to receive the interest of such choses, for he maintains his wife: but if the husband has received a handsome fortune with his wife, and has made no settlement, the court will not only stop the principal from going into his hands, but the interest also, that it may accumulate for her benefit. (1) The assignees of a bankrupt husband are subject to the same equity. They stand in the shoes of the husband, and cannot, in such case, have the aid of chancery without making a provision for the wife. 8 Atk., 21, 2 Atk., 420; 1 P. Wms., 382.

The case is the same when the husband becomes an insolvent debtor, and takes the benefit of an insolvent act, and his property is assigned. It seems to have been a question, in the case of *Warrel v. Martar*, 1 Cox P. Wms., 459, in the notes, whether the court would interfere, if the wife made the application for a suitable provision for her out of such property; but it is now settled that they will so direct, whether the application is on the part of the assignees or by the wife. (2) 5 Ves., 737; 10 Ves., 578.

* But if the husband had assigned such choses, for a [*10] valuable consideration; according to some opinions, equity will not compel the assignees to make such provision.

Lord THURLOW, in the case of *Warral v. Martar*, expressed himself fully on this subject, that an assignee for a valuable consideration need not provide for the wife. (3)

rett, 1 Binn., 365; 9 Serg. & Rawle, 183. In Maryland it is held that whenever the husband can reach the wife's property in a court of law, chancery cannot interfere in her behalf. *Rogers v. Krebs*, 6 Har. & John., 37. In South Carolina the courts of equity adopt the English rule. *Tatnall v. Fenwick*, 1 Desaus. Ch. R., 143; *Ex parte Beresford*, Ibid., 268; see also *Thomas v. Shepherd*, 2 McCord's Ch. R., 40; *Duryee v. Browyer*, Ibid., 368. So in Kentucky. *Elliot v. Waring*, 5 Monr., 340; Ibid., 268; 7 Ibid., 660; 2 J. J. Marsh, 495.

(1) *Udall v. Kenney*, 3 Cow., 590; 8 C., 5 John. Ch. R., 464.

(2) *Van Epps v. Van Deusen*, 4 Paige Ch. R., 74; *Harper v. Ravenhill*, 1 Tamlyn's R., 144; *Pierce v. Thornly*, 2 Simons, 167; *Honnor v. Morton*, 3 Russell's R., 65, 90.

(3) Where the assignment is by operation of law, and not the act of the husband for a valuable consideration, it seems the assignee will be compelled to make the necessary provision. *Smith v. Kane*, 2 Paige Ch. R., 303; and, indeed, some of the cases go so far as to say that any assignee of the husband will be compelled to

The authorities cited in the margin teach us this doctrine, that when a husband cannot avail himself of his wife's property, without the aid of chancery, the court will refuse its aid, unless the husband will make a suitable settlement on the wife. (a) Even where the husband has assigned his title to a creditor, the court will not aid that creditor, unless he make out of it a reasonable provision for the wife. There is a difference of opinions, however, expressed in some of the authorities. I will endeavor to present to the reader's view the different opinions which have been entertained on this subject.

In the case of *Warral v. Martar*, Lord THURLOW seems to think, that the interference of chancery is never had when the assignment is by express contract of the husband, but only where the assignment is by operation of law. It is true, that the current of authorities support this opinion, in cases where a wife owns the trust of a term. In such case the assignee of the husband holds the estate without being liable to provide for the wife. And the case is the same when some specific chose has been assigned, although there has not been an entire coincidence of opinions in the authorities.

In the case of *Doyly*, 1 Ch. Ca., it was the opinion of the court, that the husband could not charge or grant away the trust of a wife's term. But subsequent authorities teach a different doctrine. 2 Atk., 208.

In Sir Edward Turner's case, 1 Vern., it was holden, that if a term was assigned in trust for the wife, with the privity of the husband, that he could not grant it away.

*The case of *Pitt v. Hurd* is to the same purpose. 1 Vern., [*11] 18. In a case in Pre. in Chan., 825, where the husband assigned a specific chose of the wife, viz.: a legacy for the payment of a debt of his own, on a bill by the assignee against the husband and wife, and the testator's executor, it was decreed in favor of

(a) 2 Shew., 222; 2 P. Wms., 202; 1 Ves., 40; 2 Atk., 417; 2 P. Wms., 628; 2 Ves., 521; 2 Atk., 20.

make it, if he places himself within the jurisdiction of a court of chancery. *Hornsby v. Lee*, 2 Madd. R., 16; *Gaynor v. Wilkinson*, 2 Dick., 491; *Ex parte Bielby*, 1 Glyn. & Jam., 187; *Udall v. Kenney*, 3 Cow., 590; *Duvall v. Farmers' Bank of Maryland*, 4 Gill & John., 282; *Perryclear v. Jacobs*, 2 Hill's S. O. Ch. R., 509; *Like v. Beresford*, 3 Ves., 506.

the assignee, without making him liable to make any provision for the wife.

The same doctrine is holden in 2 Atk., 206. But the law is otherwise if the property assigned is in the hands of the court, and the wife is a ward of chancery. The court, in such cases, will give no aid to the assignee, unless he will make a provision for the wife. 3 Ves., 506.

The rule, as laid down by Lord THURLOW, seems to be corroborated by the authorities here cited, in cases of the assignment of the wife's interest in a trust of a term, as also in cases of the assignment of a specific chattel belonging to the wife by the husband; but when the assignment does not specify the property in question, but it is expressed in general terms, the assignee has no greater equity against the wife than the husband had. As in a case, 2 Atk., 417; a wife being, by the will of her father, entitled to a fourth of his personal property, the husband made an assignment of all the right that he was entitled to, in right of his wife, to her father's estate.

The same doctrine is established in the case of *Wenman v. Mason*; 1 Cox. P. Wms., 459, notes. There is a case to the same purpose. 4 Bro. in Chan., 139.

In 4 Ves., 19, in the case of *McAuly v. Phillips*, the chancellor states the rule to be, that an assignment by a husband of the wife's chattels, for a valuable consideration, is in no case a bar to the equity of the wife, to be provided for by the husband, except in the case of a trust of a term. But it seems, from the [*12] cases before cited, that the exceptions made by the chancellor are too narrow;* for, the husband's assignment of a specific chattel, is a bar to such equity of the wife.

If the trustee be willing to pay the choses to the husband, chancery never prevents it; or in the ordinary case, where the husband has a legal remedy, chancery never inhibits the husband from proceeding, although he makes no provision for his wife. (a) (1)

(a) 3 Atk., 240; P. in Ch., 414; 3 P. Wms., 639; 3 do., 11; 3 Atk., 67, 430.

(1) Here again the question is presented which was somewhat discussed in note 1, page 9. Notwithstanding the authorities there cited in affirmation of the

In 1 Ves., 161, it was determined that money in the hands of trustees for the benefit of a wife, not her separate property, on the death of her husband should go to the wife, and not to the executor of the husband.

It is difficult to discover on what principle this decree was made; for money in the hands of trustees is not a chose. I know of no difference between money belonging to her in the hands of trustees, and money paid to her, which would certainly belong to the husband; except only, that the husband must have the aid of a court of chancery to get the money. This they will refuse, unless the husband, not having before made a competent provision for his wife, will make a suitable provision out of the money in the hands of the trustees. It appears to me that the executor of the husband would be entitled to the money, provided he would make for the wife such provision as the court should direct. The court must have considered this money as a

proposition in the text, it may still be considered a doubtful question, with its equity on the side of the wife. With respect to that portion of her personalty which the husband can acquire possession of without the assistance of equity, it is said in the following cases that he will not be disturbed in the exercise of that right: *Howard v. Moffatt*, 2 John. Ch. Rep., 206; *Thomas v. Shepherd*, 2 McCord's S. C. Ch. Rep., 36. But directly opposed to this is the case of *Van Epps v. Van Deusen*, 4 Paige, 64. It is there said that it has been doubted whether a court of chancery could interfere to restrain the husband or his assignees from proceeding, at law, to possess himself of the wife's property in action, and to compel him to allow her a suitable provision out of the same for her support. But if the wife is entitled to such an equity, upon a bill filed by the husband or his assignee, or by a third person, as all the cases upon the subject admit, there seems to be no valid objection, in principle, against granting her similar relief, where the husband or the general assignee in bankruptcy is endeavoring to deprive her of that equity by an unconscientious proceeding in a court of law. Although chancery will restrain him from proceeding in the ecclesiastical court for a *legacy or distributive share* belonging to the wife (*Grignion v. Grignion*, 1 Hagg. Eccl. Rep., 535), yet it has been held that it will not, at the suit of the wife, compel a settlement out of a *chose in action*, bequeathed to her for life, but not expressed to be for her *sole and separate use*, against a particular assignee for a *valuable consideration*. Such words must be used as conclusively show that the gift was intended for her *sole and separate use*, in order to bar the right of the husband. *Elliot v. Cordell*, 5 Madd. Ch. Rep., 149; *Stanton v. Hall*, 2 Russ. & Mylne, 175; *Tyler v. Lake*, *Ibid.*, 183; *Eedes v. Eedes*, 11 Simons, 569.

chose, otherwise the symmetry of the law of Baron and Femme is marred by the decision. (1)

It has been stated, that if the wife should die before the husband, the choses of the wife would not belong to him, but go to her executor or administrator, to be disposed of as the property of every deceased person is disposed of. Certain it is, that at

(1) In the case of *Udall v. Kenney*, 3 Cow., 590, the equitable right of the wife to a suitable provision out of her own personal estate, either as against the husband or his assignee for a valuable consideration, underwent a thorough investigation. This was an appeal from the court of chancery. Eliza Hewitt, an infant, entitled to eight thousand dollars in stock under the will of her father, upon her arriving at the age of twenty-one, married to Edward M. L. Kenney. On the 9th of February, 1818, she then being a little over sixteen years of age, herself and husband sold the stock in question to the appellant for a valuable consideration. On the 11th of November, 1820, she filed her bill, praying that the assignment to Udall might be declared void, and for such a disposition of the stock as would secure it for her own support and maintenance, and place it beyond the control of her husband. The question was presented, whether an assignment for a valuable consideration of a specific chattel was a bar to the equity of the wife. SAVAGE, Ch. J., after a careful investigation of all the decisions upon this subject, somewhat contradictory, as appears from the text, came to the following conclusions: 1. That the wife had an undoubted right to a provision for her and her children, if any, out of her equitable property as against her husband, or *any assignee* of the husband's, and that, when it is necessary to come into a court of equity for its aid in obtaining possession of such property, the court will see that a proper provision is made. 2. That though, in general, the husband, who lives with and maintains his wife, is entitled to receive the dividends and interest of her estate, yet when he deserts his wife, or neglects or refuses to provide for, and maintain her, or has shown a disposition to waste her property, in such cases the court ought to direct the interest to be paid to the wife, or a trustee for her benefit.

The case of *McAuley v. Philips* (4 Ves., 19), cited by Judge REEVE, makes but one exception to the general rule that the husband's assignment is no bar to the equity of the wife, and the author seems to be of opinion that the assignment of a specific chattel is another. In this he is expressly contradicted by the case of *Udall v. Kenney*, and there is a strong array of authorities against him. Like *v. Beresford*, 3 Ves., 506; *Pope v. Crashaw*, 4 Br. Ch. Cas., 326; *Povey v. Brown*, Pr. in Ch., 325; *Saddington v. Kinsman*, 1 Br. Ch. Cas., 44; *McAuley v. Philips*, above referred to; *Wright v. Morley*, 11 Ves., 17; *Haviland v. Myers*, 6 John. Ch. Cas., 25; *Haviland v. Bloom*, *Ibid.*, 178. By these authorities, and particularly the case of *Udall v. Kenney*, which presents a striking instance of the healthful influence of a court of chancery in guarding the rights of the helpless and unprotected, it is hoped this question is finally put at rest. For a further discussion, see the case of *Hanson v. Keating*, 4 Hare's Rep., 1.

common law this is the case; but it is now settled that he is the rightful administrator of his wife, and may, in this capacity, collect her choses. The money arising from them will be [*13] assets* in his hands to pay her debts. If there be a surplus, by the statute of 29th Car. II., he is not obliged to account for the same to her representatives, that is to say, to her issue or next of kin. The surplus, after paying the debts, is considered, by virtue of that statute, as belonging to him; so that if any other person should administer on the estate of the wife, on his refusal or incapacity, such administrator must account to the husband for the surplus, after paying the debts due from the wife. (a) After enacting the statute of distributions, the question arose, whether the husband must distribute to the next of kin as other administrators were obliged to do; and to settle this question, the statute of 29th of Car. II., was enacted. (b) (1)

(a) 4 Co., 51; 1 Roll. Abr., 190; 1 Sd., 407; Moor, 871; 1 P. Wms., 378, 389; 3 Atk., 536; 1 Ves., 15; 1 Wils., 168.

(b) 2 Mod., 20.

(1) Roll. Abr., 190; Clark v. Clark, 6 Watts & Serg., 85. A husband is not entitled, as administrator, to the wife's share of the proceeds of real estate sold by order of the orphan's court, after her death, though the order of sale was made previously; but he is entitled as tenant by the curtesy, to the interest during his life. Ferrer v. The Commonwealth, 8 Serg. & Rawl., 315; otherwise if she die after a sale of her land. Huett v. Fisher, 1 Har. & Gill, 88; Leadenham v. Nicholson, Ibid., 267. Upon this subject generally, see also Rogers v. Krebs, 6 Har. & John., 31; Hammond v. Steer, 2 Gill & John., 81; Harleston v. Lynch, 1 Desaus. Ch. Rep., 244. The representative of the husband is entitled to administration upon such choses of the wife, for the right of administration follows the right of estate, and ought, in case of the husband's death after the wife, to be granted to the husband's next of kin. Elliott v. Collyer, 3 Atk., 526; Bouchier v. Taylor, 1 Wils., 168; Harg. Law Tracts; 1 Ves., 15; Bro. Rep., 414. Therefore if administration, *de bonis non*, of the wife be granted to a third person, he is a trustee for the representatives of the husband. Squib v. Wyn, 1 P. Wms., 378; Cart v. Rees, Ibid., 381; Whittaker v. Whittaker, 6 John. Rep., 112; Hendren v. Colgin, 4 Munf., 231; Clark v. Clark, 6 Watts & Serg., 85. If the husband, without taking out letters of administration, obtain possession of the wife's personal property, he may retain it against his wife's next of kin. Hendren v. Colgin, 4 Munf., 231. And if the wife's next of kin administer, he will be a trustee for the husband or his representative, if the husband die before administering. Stewart v. Stewart, 7 John. Ch. Rep., 229; see also Hagg. Eccl. Rep., 341; Betts v. Kimpton, 2 Barn. & Adol., 273; Hunter v. Hallett, 1 Eden's Ch. Rep., 388; Clark v. Clark, 6 Watts & Serg., 85.

Where a husband has permitted his wife, without any marriage contract, to retain

In those States where there is no such statute as the English statute of 29th Car. II, it is contended by some that the husband has the same right to the choses of his deceased wife as in England, and that the statute of Car. II was in affirmance of the common law: this is denied by others, who contend that this statute introduces a new regulation wholly unknown to the common law. I will attempt a historical deduction of this subject, as it may serve to elucidate the question in dispute.

We shall find that the most ancient doctrine on the subject of intestacy was this: that, where a person died intestate, the king, as *parens patriæ*, was considered as having the legal title to his personal estate, but holding it in trust for others in *foro conscientie*. If it were a husband who died, leaving wife and children, he held in trust for the wife a *rationabilis pars*, and for the children a *rationabilis pars*, neither of which, by the ancient common law, could the husband devise away. The other third part, after the debts of the deceased were paid, was at his disposal; but, according to the superstitious notions of the times, he was bound to dispose of it in such manner as was best for the soul of the deceased owner.

* It is apparent that this business could not be performed
[*14] by the king in person: it must necessarily be committed to others, to act by virtue of authority derived from the king;

possession and control of the personal property she had before marriage, he is nevertheless entitled to administration upon her estate, and to retain the balance to his own use. *Jones v. Brown*, 37 N. H., 439. See also *Westervelt v. Gregg*, 12 N. Y., 206, where it is held, that if the husband die before the choses in action of his wife are reduced to possession, his representatives are entitled to them. Also *Valence v. Bausch*, 28 Barb., 633; *Lee v. Wheeler*, 4 Georgia, 541.

The statutes of New York, of 1848 and 1849, gave a married woman power to take, hold, convey and devise her property, but made no change as to its disposition should she die intestate. Held also, that the husband's right to administer did not spring from his right to the estate, but he became entitled to the estate because he had a right to administer. *McCosker v. Golden*, 1 Bradf., 64; *Ransom v. Nichols*, 22 N. Y., 110.

A devise of real and personal property to a married woman for her sole and separate use, "not to be liable for her husband's debts, nor subject to curtesy or any life estate or marital rights," does not exclude the husband from administration under the intestate laws. *Farie's Appeal*, 23 Penn., 29.

and it was supposed that no persons could be found more proper to fulfill this conscientious trust than the clergy.

It might be reasonably concluded that no men would more regard the rights of widows and orphans than clergymen; and they might well be supposed to know, better than any other men, what would conduce to the consolation of a departed spirit. Thus it was, that the whole personal property of the deceased (and, in case of a wife's deceasing, it would be nothing but her choses in action) went to the king, and from him passed to the clergy. They held it as trustees to pay the debts, and, after the debts were paid, to distribute the residue to the issue of the deceased, and, on failure of issue, to the nearest kindred of the deceased. In this manner the estates of deceased persons came into the hands of the clergy, who applied these estates to such uses as they called pious. Unfortunately, creditors were in this way defrauded of their dues, and widows and orphans of their shares. During the prevalence of popery, the doctrine was that the clergy were accountable only to God and their consciences for what they did with estates. There was no forum established before which the rights of widows, orphans and creditors could be enforced; although it was acknowledged that these several characters had their rights, as has been before stated. This was a singular state of things; when there were rights, for the enforcing of which no remedies were provided by law; and when the aforesaid trusts were not fulfilled. Even at this period it was complained of as a great abuse. When a wife died, there was not the least pretense that the husband was entitled to her choses; but her representatives, as before stated, were alone entitled. *Such advantages to defraud, fortified by the superstition of the times, the clergy did not neglect to [*15] improve. The fact is, under the pretense of applying the estates of deceased persons to *pious uses*, they applied them to their own use, neglecting the duties incumbent upon them. (a) The first check given to such abuse was by a statute of Hen. II, which gave an action to creditors against the bishop to recover their dues. Afterwards, by statute of Edw. III, the bishops, to whom the care of intestate estates was committed, were enabled to

(a) 4 Reeve's His., 71, 85, 557.

appoint administrators on the estate of deceased persons. By that statute, they were to be the next friends of the deceased, and were now to perform the duties which before belonged to the bishops. (a)

In the construction of that statute, it was always held, that the husband had a right to administer on the estate of his wife, as her next friend. This, however, did not alter the rights of any person to the intestate's estate; for the administrator was now to perform the trust which formerly belonged to the bishops, and what that trust was, we have before seen.

A subsequent statute of Hen. VIII, was made, directing that administration should be committed to the widow or next of kin to the deceased; and, although the husband was not next of kin to his wife, yet the practice, which obtained under the statute of Edward III, of appointing the husband administrator on the wife's estate still continued. As the bishops had done before, so the administrator in his turn refused to distribute the shares to those persons to whom they respectively belonged, alleging there was no law compelling the bishops to distribute, and, that he came in their place, and was no more compellable to distribute the intestate's estate, than the bishops formerly were. This question [*16] came, at length, before the court for decision, and it was solemnly adjudged, that *the administrator was not compellable to distribute the estate of the intestate. Thus, when any person had obtained the appointment of administrator, he would take the whole estate, although there were others of equal degree of kindred with himself, who had a right to the estate equally with him. (b)

The husband administrator, imitating the example of all other administrators, refused to distribute the estate of his wife to his wife's relations, who alone were entitled to it. To enforce the rights of those to whom estates belonged, the statute of 22 Car. II, was enacted, compelling administrators to distribute the estates of intestate persons, to those to whom they belonged.

From this view of the subject, it is manifest, that this statute did not give any new right to the representatives of the deceased,

(a) 2 Reeve, 287.

(b) Moor, 154; Holt, 88, 191.

but afforded them a remedy to enforce their ancient rights, defining more particularly than had been heretofore done, who were entitled to a distributing share.

If then it should be asked, whether the administrator of the deceased wife, under this statute, is liable to distribute her choses in action to her representatives, that is to say, to her issue, and, for want of issue to her next of kin and their legal representatives, according to the direction of that statute; the answer must be, that he is liable, for the express words of the statute make him liable. No other answer can be given. Before the enacting of this statute, all the children of a deceased person were equally entitled to their shares of the personal estate of their father; yet if one of them procured administration on the estate, he would take the whole estate to himself. In the same manner, when the wife died, the husband, being considered as having a legal right to the administration on her estate, and having obtained the appointment of administrator on his wife's estate, could not be compelled to distribute to her representatives. But this statute of 22 *Car. II, made it the duty of all administrators to distribute the estates of deceased persons. By a subsequent [*17] statute of 29th Car. II husbands were permitted, after having paid the debts due from their wives, to hold exclusively all their wives' choses in action, without any liability to account with any person for them. This statute was not declaratory of the common law, as the statute of distributions was. It totally altered that law, giving that to the husband which before belonged to the representatives of the wife. By this statute, that estate, which, before the statute of 22d Car. II, the husband held unrighteously from the true owners, he is now entitled to hold exclusively to himself, and that legally. In several of the states, there is no such statute as 29th Car. II, placing husbands in a different situation from other administrators. That statute was enacted at a period long after the emigration of our ancestors to this country; so that there can be no pretense that it has the influence of a law here. All the states, however, have statutes of distributions similar to the statute of 22 Car. II, compelling all administrators to distribute the estates of intestate persons, to the issue of the

deceased, and, on failure of issue, to his or her next of kin and their legal representatives, varying indeed, in some respects, from the English statute on that subject and from each other. I apprehend, therefore, that, in such states, the issue of the deceased wife, or her kindred, are entitled to her choses after the payment of debts; and not the husband. If a wife, having a separate property, should die without disposing of it, the husband is administrator, and it is assets in his hands; and after debts are paid, the surplus belongs to him. It is said by the Chancellor, in 1 Ves., Jr., 49, that he takes it as next of kin. I apprehend that a husband, as such, is not of kin to his wife, and is not entitled to her estate, on that ground. "Of kin," means related [*18] by blood, as in the *statute of Henry VIII, which was printed in Latin, which directed to whom administration of intestates' estates ought to be committed; the words since translated into English, "next of kin," are "*proximo de sanguine*."—The rule provided for computing the degrees of kindred, excludes the idea of husband, as such, being of kin to the wife. By this rule we ascend from one of the relations to the person who is the common ancestor of them both, counting one to each ancestor of his, until we arrive at the common ancestor; and then descend, counting one to each ancestor of the other relative, until we arrive at that other relative. Thus, if we would know how nearly related Polly Stiles is to Alfred Stiles; Polly being the daughter of Thomas Stiles, and Alfred the son of John Stiles; and Thomas and John being brothers, and the sons of Reuben. Counting from Polly to Thomas her father, is one; from Thomas to Reuben is two. We have now arrived at the common ancestor of both; for Reuben is grandfather both to Polly and Alfred. Now, counting down from Reuben to John, the father of Alfred, is three; and from John to Alfred is four; so that Polly and Alfred are related in the fourth degree. But no such computation can be made to ascertain the relationship of husband and wife, unless they were related before their intermarriage. If the husband be of kin to his wife; I presume the wife is of kin to the husband. If so; the statute, which directs administration to be granted to the widow, or next of kin, is tautological. For, if

she be related to the husband, as next of kin, she would have been included in the statute. If the direction had been to give it to the next of kin, I entertain no doubt but that he takes the surplus after her debts are paid, by virtue of 29th Car. II, which gave to him all the personal estate of his wife, after her debts were paid; and in those states* where such a law as 29 Car. II, exists, the husband will take such estate. [*19]

In 3 Ves., 247, it was decided that a husband was not next of kin to the wife; and that he took her personal estate as administrator, without liability to account after debts were paid; and whether he administer or not, and dies, and her next of kin administer, such next of kin is a trustee for the personal representative of the husband. (a)

An annuity is granted to a *femme sole*; she marries, and, during the coverture, arrears accrue; she dies; the arrears belong to him as husband, and not as administrator, by the common law. By statute of Henry VIII, the arrears before coverture also belong absolutely to him. (b) The reason why the husband is entitled, at common law, to the uncollected arrears of the annuity which became due during the coverture, is founded on the same principle as that by which the husband is entitled to the *usufruct* of her real property. An annuity, although it has the appearance of personal estate, is, in fact, real estate; it is an incorporeal hereditament.

(a) 1 P. W., 331; 3 Atk., 536; 1 Wils., 168; 1 Ves., 15.
(b) Owen, 3; 4 Co. Rep., 57.

CHAPTER II.

THE HUSBAND'S RIGHT TO JUDGMENTS OBTAINED IN HIS OWN NAME
AND HIS WIFE'S. HIS RIGHT TO HER CHATTELS REAL. HIS
RIGHT TO HER REAL PROPERTY DURING COVERTURE, AND AFTER
HER DEATH.

WHEN a judgment has been recovered in the name of husband and wife, for a debt due to the wife, it is a settled rule that, if the husband dies before collection, such judgment belongs to the wife; but if she dies before the husband, and before collection, the judgment belongs to the husband. (a) (1) It is easy to see why it is that the wife is entitled to the judgment when the husband dies first, and the money is not collected. This judgment is founded on a chose which belonged to her before marriage; and, by the law of Baron and Femme, on the husband's death, she is entitled to her choses in action not collected or disposed of by the husband during the coverture. On what principle is it, then, to be accounted for, that, on her death, he should be entitled to this judgment as exclusively as if it had been obtained at first in his own name, without his wife? By the law of Baron and Femme, if the wife die first, and her choses be not collected, they will belong to her administrator, to be disposed of as the law directs; but such judgment the husband does not hold as administrator, accountable for it as assets in his hands: it belongs to him absolutely. It is apparent, then, that this is an exception to the general rule, founded, no doubt, upon the doctrine of the *jus accrescendi* of joint-tenancy; for the husband and wife are [*21] joint-tenants* of such judgments; and when either die, the whole judgment belongs to the other, without liability to account to any person. (2) In some of the States, the

(a) 1 Mod., 179; 3 do., 189; 1 Sid., 387.

(1) 2 Kent's Com., 134; *Searing v. Searing*, 9 Paige, 283.

(2) It is said, however, that the husband and wife, being one person in law, cannot be joint-tenants. Although the husband, with regard to such judgment, may, after the death of the wife, stand somewhat in the position of a joint-tenant

doctrine of the *jus accrescendi* is exploded; and joint-tenants in those States are not, in this respect, different from tenants in common; and every joint judgment stands upon the same ground. As where two merchants in company, who, by law, are tenants in common, obtain a judgment, and one dies; in such case, the right and duty of collecting the judgment belong to the survivor; but when collected, he must account with the executor of the deceased partner.

So, where there is a joint judgment in the name of husband and wife, the duty of collecting the judgment survives to him; but as he has no right to hold the avails by reason of the *jus accrescendi* where this doctrine is rejected, he must, if we preserve entire the law of Baron and Femme, account for this judgment. If he be administrator to his wife, it will be assets in his hands to pay the debts of the wife. If not wanted for that purpose, it will, in England, by force of the statute of 29 Car. II, vest in the husband; and he will be entitled to keep it, as he may all her choses, and never account to any person. In some of the States there is no such law as the 29 Car. II, and in these States I should suppose that the husband must distribute the avails of such judgment to the legal representatives of the wife, in such manner as the law directs.

A husband submits a claim in right of his wife to arbitration, and the arbitrator awards a sum of money on this claim, to be paid to the husband. By the award the original claim is extinguished, and a new duty arises by force of the award, and that duty is to be performed to the husband. If, then, the husband should die before the money awarded is paid, it will go to his executors, and not to the wife. So, if the law permitted him, which it does not, *to sue for a debt due to his wife, [*22] without joining her, and he obtain judgment in his name alone, the money due on that judgment would go to his executor. (a)

(a) 1 Ver., 396.

to the heirs of the co-tenant, still the application of the term is improper. With respect to lands where two other persons would be joint-tenants, they are each seized of the entirety, except, perhaps, in Ohio, where they take as tenants in common. *Sergeant v. Stienberger*, 2 Ohio Rep., 305; 2 Kent's Com., 132

We have seen that the husband has power to release all the choses of the wife during the coverture. Still, if the wife have an annuity for life, and the husband release it by deed to the grantor, the wife shall have it after his death; for an annuity is an incorporeal hereditament for life, which it is out of the power of the husband to release. It is true, such a release will have the effect of discharging the grantor during the life of the husband. (a) (1)

By marriage, the husband becomes entitled to dispose of his wife's chattels real at pleasure, such as leases for years and estates by *elegit*, statute merchant, &c. They may also be taken on execution for his debts; and by this means the title is transferred (by operation of law) from the wife to the creditor of the husband. (b) (2)

If her chattels real be not disposed of, and the husband die, living the wife, they go to the wife as her choses do: if the wife die before the husband, they go to the husband. (3) Mark, in this respect, the difference that there is betwixt her choses in

(a) Moor, 523; Co. Litt., 300.

(b) 1 Roll., 343, 315; 1 Roll., 341; Pr. in Ch., 418.

(1) 2 Kent's Com., 134.

(2) Bac. Abr., tit. Bar. and Fem.; Dade v. Alexander, 1 Wash. Rep., 30. And it is said (3 P. Wms., 200) that an assignment of the real chattels of the wife will bind her, though it be made without consideration; and if the wife has a judgment and it is extended on an *elegit*, the husband may assign it without consideration; and if a judgment is given in trust for a *femme sole* who marries, and, by consent of her trustees, is in possession of the land extended, the husband may assign over the extended interest. By the same reason, if the *femme* has a decree to hold and enjoy lands until a debt due to her is paid, and she is in possession of the land under this decree, and marries, the husband may assign it without consideration. See Merriweather v. Brooker, 5 Litt., 256. He may sell the usufructuary estate in the wife's land, but not the fee, without her concurrence. Bailey v. Duncan, 4 Monr., 260. He cannot dispose of such an interest as the wife is possessed of by his provision and consent by way of settlement Sir Edward Turner's case, 1 Vern., 7; Whitmarsh v. Robinson, 1 Coll., 571. In Vermont, the husband, after issue born alive, has such an interest in the freehold estate of his wife as may be taken by levy of execution. Mattocks v. Stearns, 9 Vt. Rep., 326. Such levy is, however, liable to be defeated by a divorce *a vinculo*. S. C., and see Stearns v. Stearns, 10 Vt. R., 540.

(3) Co. Litt., 351, a; 2 Kent's Com., 134; 1 Inst., 351; 9 Mod. R., 43.

action and her chattels real. (a) The former, in case of her death, if not collected, go to her representatives, and not to her husband; but the chattels real, upon such an event, go to the husband by common law. (b) He does not hold them, by force of a statute, as administrator, the avails of which are to be applied to the payment of the debts of the wife; but he holds them as his own: it being one of his marital rights that his wife's chattels real, upon her death, shall belong to him absolutely. (1)

If the husband mortgage the wife's term, and she die, the equity of redemption belongs to him. The wife's term is forfeited by attainder of the husband. (2) Hob., 8. Plow., 263.

*It is frequently observed in the elementary writers, that husband and wife are joint-tenants of her leases; and that [*23] by the *jus accrescendi* of joint-tenancy, the estate must belong to the survivor. If it be true, that husband and wife are in fact joint-tenants; and if this be the reason why he takes her chattels real as survivor, on the death of his wife; it will destroy the right of the husband, as husband, to her chattels real, in those states where the *jus accrescendi* is not acknowledged to be the law of the land. Of course, on the death of the wife, her chattels real must, in those states, go with the rest of her personal property to her administrator; and, in his hands, will be assets to pay her debts. (3)

(a) 1 Ver., 370.

(b) 1 Roll., 345, 346.

(1) Whittaker v. Whittaker, 6 John., 112.

(2) But a note and mortgage to husband and wife, if the husband dies first, goes to the wife, and not to the administrator of the husband. Draper v. Jackson, 18 Mass. Rep., 480. And where the equity of redemption, is reserved to husband and wife, it belongs to the wife if she survives him. Pitt v. Pitt, 1 Turn. Ch. Rep., 180; Rec., Abr. tit. Bar. & Fem. But see the case of Richardson v. Daggett, 4 Vt. Rep., 336.

Held, that the wife was entitled to survivorship in money secured to herself and her husband by a promissory note or certificate of deposit, no other facts appearing. Orphan Asylum v. Strain, 2 Bradf. (N. Y.), 84. So also an agreement to pay to husband and wife during the life of the longest liver a given sum, survives to the wife after the death of the husband, and she may assign it. Priadle v. Caruthers, 15 N. Y., 435. See also Piles v. Collins, 33 Maine, 38; Wright v. Saddler, 20 N. Y., 323; Stuckey v. Keefe's Exors., 26 Penn., 297; Torrey v. Torrey, 4 Vern., 420.

(3) The relation of joint-tenants, between husband and wife, is believed to exist only in the State of Connecticut. Whittlesey v. Fuller, 11 Conn. Rep., 327. In Ohio,

But I apprehend, that the position of the elementary writers, before alluded to, is unsound. To constitute a joint-tenancy, the title of the tenants must commence at the same time. They hold by one joint title, and in one right; and the title always arises from the act of the parties, and never by operation of law. The title, which the husband obtains to his wife's chattels real, bears no resemblance to a joint-tenancy; for the title of the wife accrues before the title of the husband; whereas to have constituted a joint-tenancy, it must have occurred at the same time.

The wife is entitled in her own right in fee, whilst the husband is entitled in her right during coverture. But, to constitute a joint-tenancy, the tenants must hold in the same right. The husband's right to the chattels of the wife arises from operation of law; but a joint-tenancy is never created by operation of law. I apprehend, therefore, that the husband cannot be considered as holding such estate as joint-tenant with the wife; and of course that there ought not to be any difference between the English law and the law of those states where the *jus accrescendi* of joint-tenancy is rejected, respecting the interest* which the husband takes in the wife's chattels real; for the husband's

where the doctrine that they are tenants of the entirety is rejected, they are tenants in common. *Sergeant v. Stienberger*, 2 Ohio Rep., 345. The true doctrine in most of the states is thus declared by Chief Justice NELSON, in *Barber v. Harris*, 15 Wend., 617. The husband and wife, in contemplation of law, are but one person, and therefore incapable of holding either as joint-tenants or tenants in common. Each is seised of the entirety, *per tout et non per my*; and being but one person there can be no moiety or separate estate between them; and the husband, therefore, cannot forfeit or alien the whole estate, because the whole of it belongs to the wife as well as him. If a grant is made to husband and wife and a third person, the husband and wife have one moiety, and the third person the other; so if the grant be to husband and wife and two others, the husband and wife take one-third only. *Johnson v. Hart*, 6 Watts & Serg., 319; see also *Greenlaw v. Greenlaw*, 13 Maine Rep., 186; *Den v. Whitmore*, 2 Dev. & Bat., 537; *Doe v. Parratt*, 5 Term Rep., 652; *Taul v. Campbell*, 7 Yerg., 319; *Jackson v. McConnell*, 19 Wend., 175; 16 John. Rep., 115; 5 John. Ch. Rep., 437; 2 Black. Com., 182; Cruise Dig. Real Prop., tit. 18; Joint-Tenancy, ch. 1, § 35; 2 Vern., 120. It is said, however, that they may be made tenants in common, by *express words*, by a gift to them during coverture. Preston on Abstracts of Title, 41.

A husband and wife who are tenants in common, cannot constitute adverse parties in an action to compel partition. *Howe v. Blander*, 21 Vt., 315.

title does not, in England, depend on that doctrine. The reason, therefore (for anything that appears), why the husband should have the chattels real of his wife, on her death, is as strong in all parts of this country as in England. It is a provision of the common law, I apprehend, which we have adopted. Although the husband has the most unlimited power of disposing of the chattels real of the wife during coverture, so that even a lease by him, to commence after his death, will be good; yet he cannot devise them away by will. I presume that, when a husband disposes of them by lease to commence at his death, it must be a disposition for a *bona fide* valuable consideration. The law will not prevent him from reaping the advantage which will arise from a sale; but it will prevent him from disposing of them gratuitously to the disadvantage of the wife.

If the husband lease the wife's term and die, the rent is to be paid to the husband's executor. It will make no difference if he had leased only part of the term; for, although the wife, on such an event, is entitled to the reversion, yet rent is not incident to the reversion of a term for years. (a) (1)

Bristow v. Heath was as follows: Husband takes a wife who had a term for twenty years. The husband leases it for ten years, for an annual rent, reserved to him and his executors; and, before the expiration of the ten years, the husband dies. The question was, to whom the rent was to be paid. Two of the justices held that the rent was gone, and payable to no per-

(a) *Oro. Eliz.*, 287; *Pop.*, 5; *Moor.*, 305; *Co. Litt.*, 251; 1 *Roll.*, 344; *Flow.*, 418.

(1) *Oro. Car.*, 344; *Co. Litt.*, 300; *Oro. Eliz.*, 33, 279; *Bro.*, tit. Charge, 3; *Godb.*, 279; 2 *Keb.*, 299; *Vent.*, 259. From these ancient authorities, and also those cited in the text, it seems that such rent is to be paid to the husband's executor, and not to the wife, although she owns the reversion; because she is not a party or privy to the lease, and the rent is not incident to the reversion; and it seems that although the wife were a party to an under lease, she would not be entitled to the arrears of rent due on the husband's death, but if the rent had been reserved by the husband to himself and wife, she would be entitled both to the future rent and to the arrears due, because they, remaining in action and being due in respect of the joint interest of the husband and wife in the term, would, with their principal the term, survive to the wife. *Bac. Abr.*, tit. Bar. & Fem. (D.), a. 17; *Rop.*, Bar. & Fem., c. 5, § 2.

son. The other justice held that the wife was entitled. They all agreed that the executor was not entitled. I am not able to discern on what principle this decision was founded. Certainly the husband has a right to dispose of part, or of the whole, of [25*] the wife's term, by sale or by lease, though * he cannot dispose of it by will. If he had sold it, the sale would have been valid, and the purchase-money would have been his. His leasing it for part of the term is a disposition *pro tanto*; and how his reserving the rent to be paid annually should make a difference, I do not perceive. That he meant to appropriate the avails of it to himself for ten years, is apparent from his reserving the rent to himself and his executors; and this the husband has a right to do. It seems to me that the opinion that the rent ceased was unreasonable; for the lease was valid. The lessees ought not surely to have the enjoyment of the land without paying the rent; and the wife could not be entitled to the rent, for her husband had disposed of the term for ten years, reserving the rent to himself.

If a wife, possessed of a term for years, marry an alien, her husband obtains no right to dispose of this term. (a) (1)

The husband has the same power over leases, in trust, for the benefit of the wife, unless given to her separate use, as over leases granted directly to her, and to the profits arising from them, unless the term be settled as a jointure, or for maintenance of the wife after his death. 2 Ch. Ca., 86; Free., 82; Bulst., 118. There see the case where a *femme sole* conveyed her land by leases to trustees for herself, and married and received the rents; part of the avails she let out, and took bonds and other securities, and died. (b) The question arose, whether the husband must hold this estate as her administrator, as he did her choses;

(a) 10 Mod., 304.

(b) Vern., 7, 18.

(1) In support of this position see 1 Cruise on Real Property, 263. Nor can he be a tenant by the curtesy. 7 Rep., 25; 1 Vent., 417.

The alienage of a husband does not prevent the vesting in him, upon the death of his wife, of the entire estate of the land conveyed in fee to himself and wife subject only to the paramount right of the people upon office found or escheat. Wright v. Saddler, 20 N. Y., 320.

or in his own right as husband. It was adjudged that he held such terms and their avails, as husband, and need not inventory the same. This case is cited in Hob., 3. There are cases in which a different doctrine is holden. Cro. Eliz., 466; Tath., 155; 2 Free., 62. (1)

Cro. Eliz., 287, Poph., 4, are authorities to prove that a husband's lease of a term of years belonging to his * wife, for a certain number of years, to commence immediately on [*26] his death, is valid.

A *femme lessee* for twenty years, marries. The husband leases the farm for ten years, and dies before the expiration of the ten years. The executor of the husband has the rent for the residue of the ten years, and the wife for the residue of the term. (a) (2)

The chattels real of the wife are not only liable to be disposed of voluntarily by the husband, but they may be taken on execution by a creditor of the husband. Her choses cannot be taken on execution, except her mortgages, which may be taken; choses being a species of property, which, upon the principles of the common law, cannot be sold. (b)

(a) 1 Vent., 259.

(b) Pr. in Chanc., 412.

(1) Roll. Abr., 343. It is true that the trust of the wife's term may be sold by the husband, as well as the term itself, and it is a matter of no importance whether it be the trust of a present, actual and vested interest in the term (Pr. in Ch., 418; Factor v. Samynes, 2 Vern., 270; Bates v. Dandy, 3 Atk., 407), or of a contingent or possible interest, provided the interest be a legal one, i. e., such an interest as, upon the determination of the previous estate, or the happening of the contingency, will immediately come to the possession of the wife, unless, perhaps, in those cases where the possibility or contingency is of such a nature that it cannot happen during the husband's lifetime. Co. Litt., 46; B. Hutt., 17; 1 Salk., 326. But it is an exception to this rule, at least in equity, that, if a future or executory interest in a term, or other chattel, be provided for the wife, with the husband's consent, he cannot dispose of it from her, as it would be the height of absurdity and injustice that he should thus be permitted to defeat his own contract. But this supposes the provision to have been made *before* marriage, for, if it be made subsequent to the marriage, it is a mere voluntary act, and void against an assignee for a valuable consideration. Doyley v. Perfue, 1 Ch. Cas., 225; Turner's Case, 1 Vern., 7; Pitt v. Hunt, Ibid., 18. But a settlement made by a stranger upon the wife after her marriage is good, unless the husband expressly dissents from it. Picquet v. Swan, 4 Mass. C. C. Rep., 443.

(2) Bac. Abr., tit. Bar. & Fem., and see note 1, page 24.

It is said, that if the husband charge the chattels real of the wife, that this shall not bind her. (a)

If a femme sole be owner of chattels real, and be dispossessed thereof, and then marries and dies, the husband, never having obtained possession thereof, during the coverture, is not entitled to it, but it belongs to the administrator of the wife, as her choses do. (1)

A possibility in the wife, to a chattel real, does not vest in the husband. The wife owns a term for years, but is dispossessed, and marries and dies before possession obtained; this possibility does not survive to the husband, but goes to her administrator. So too, where the husband marries a wife, owner of a term for years, and who had disposed of it to J. S., for a term, if he, J. S. live so long: here is a possibility in the wife, that J. S. may die, before the term ends: and if he do, the wife and husband being both dead, the term will not go to the husband's executor, but to the wife's. (b) (2)

If the wife be possessed of chattels real, as executrix, the husband is not entitled to them, although he survive her.

[*27] *When a term for years is granted to a trustee for the use of a femme sole, and she marries and dies, the husband is not entitled to the use, but the administrator of the wife: neither can the husband, during the coverture, grant away the use or charge the term with incumbrances. (c) The only benefit that he can have, is the usufruct during coverture. (3)

By marriage, the husband acquires the usufruct of all the freehold estate of the wife, that is to say, of all her lands, tenements, and hereditaments, which she has in fee simple, fee tail, or for life, during the coverture. This estate is a freehold estate in the view of the law, being an estate for life, since it may by possi-

(a) 1 Roll, 346.

(b) Co. Litt., 361; 1 Roll. Abr., 345; 2 Show., 263; 1 Atk., 62; 2 Ibid., 67, 430; 2 P. Wms., 630; 3 Ibid., 11; 1 Brown, 260.

(c) Cro. Eliz., 466.

(1) 2 Kent's Com., 134; 1 Cruise Dig., 263.

(2) 9 Mod., 43; Ibid., 104.

(3) So if a future or executory interest in a term, or other chattel, be provided for the wife, with the consent of her husband, he cannot afterwards dispose of it. Bac. Abr., tit. Bar. & Fem., c. in note.

bility last during his life; and having no certain determinate period. (a) (1)

The fee of the land, however (where the estate is a fee), still remains in the wife; and any injury to the inheritance by trespass, as by cutting down trees, burning fences, pulling down houses, is considered as an injury to her. If an action be brought for the purpose of recovering on account of such injury, it must be brought as well in the name of the wife, as in the name of the husband; but the usufruct is the husband's; and for an injury to that, as the destruction of crops growing on the land, the husband alone is entitled to redress. (2)

In Palmer, 313, it is holden, that if a wife survive her husband, she shall have an action of trespass for a trespass committed upon

(a) Co. Litt., 351

(1) As governor of the family, he is so far master of it as to receive the profits of her real estate during her life. Bac. Abr., tit. Bar. & Fem., 1 Roper on Husband and Wife, chap. 2d (2d edit.); *Bailey v. Duncan*, 4 Monr., 260; *Weller v. Baker*, 2 Wils. Rep., 423; *Kenney v. Udall*, 3 Cow., 590; where under some circumstances this right of the husband will be taken away. This interest of the husband, where it consists of receiving the profits on real estate, may be taken on execution against the husband. *Mattock v. Stearns*, 9 Vt. Rep., 326.

The husband may convey his estate by the curtesy. *Trask v. Patterson*, 29 Maine, 502. The conveyance by the husband of the fee of his wife's estate passes his life estate and no more. *Miller v. Shackleford*, 3 Dana (Ky.), 291.

In many of the states, the husband's usufruct of the wife's freehold during coverture is abolished. See Act of 1860, Laws of N. Y., ch. 90; also Acts of 1848, 1849, securing to married women their property.

Act of 1848, of Pennsylvania, Dunlop's Laws of Penn., 1124, 1125; Statutes of Minnesota, 1849, 1858, p. 571, § 106; Compiled Statutes of Michigan, 1857, p. 73; General Statutes of Massachusetts, 1860, ch. 108, p. 537, § 1; R. S. of Wisconsin, 1858, ch. 95, p. 571, § 2; R. S. of Indiana, 1852, ch. 52, p. 321; Revised Code of Laws of Mississippi, 1857, art. 23, p. 335.

In Vermont, the rents, issues and profits of the real estate of any married woman, and the interest of her husband in her right in any real estate, which belonged to her before marriage, or which she may acquire by gift, grant, devise or inheritance during coverture, are exempt from sale for the separate debts of her husband, and no conveyance of the same is valid unless she join her husband in such conveyance. Compiled Statutes of Vermont of 1850, p. 401, § 15. The statutes do not have a retroactive operation. *Perkins v. Cotrell*, 15 Barb., 446; *Vartie v. Underwood*, 18 Barb., 565; *Burrows' Appeal*, 22 Penn., 164; *Kidd v. Montague*, 19 Ala., 619.

(2) 1 Chit. Pl., 63; *Babb v. Perley*, 1 Greenl. Rep., 6.

her land during coverture. This must be understood with some qualification. If the trespass be of such a nature as to injure the freehold, as pulling down a house, or cutting down trees, she is entitled to an action; but if it be an injury done to the emblements, she can have no action for this, for they do not belong to her. (1)

A wife is lessee for life. The lessor afterwards leases to the [*28] husband and wife the same lands for their lives. They* are not joint-tenants; for the title of the wife accrued before that of the husband, and the title of joint-tenants must accrue at the same time. (2) The husband holds the lands during coverture, in the right of his wife only, and after her death, the second lease accrues, by way of remainder, for the term of his own life. A remainder must be created, when the particular estate is created; but the wife's estate was created before, and it would not commence in future, on the wife's death, for it is a freehold estate.

On the death of the husband, in the lifetime of the wife, the fee of her land remains in the wife: neither his heirs nor executors have any interest therein; but the emblements growing upon the land belong to his estate. Although they adhere to the freehold, yet they are viewed in this case as personal property, and vest in his executors, who have a right to enter upon the land for the purpose of gathering the emblements. When a husband is seised of land in right of his wife, and she dies without issue by him born alive, so that the husband has no estate by curtesy therein, and the land descends to the heir of the wife, if the husband has sown or planted the land he is entitled to the emblements. (3) (3)

(1) Co. Litt., 289.

(2) Co. Litt., 361; Doct. & Stu., 1 Dial., cap. 7.

(1) 1 Chit. Pl., 641; Com. Dig., tit. Bar. & Fem., 2 a.

(2) Nor would they be, if the estate commenced in both at the same moment, for they cannot, during coverture, take separate estates. Note 1, p. 23. *Green v. King*, 2 Black. Rep., 1211; *Rogers v. Benson*, 5 John. Ch. Rep., 431; *Sutliff v. Forger*, 1 Cow. Rep., 89; *Doe v. Haviland*, 8 Cow. Rep., 277; *Den v. Hardenburgh*, 5 Hals. Rep., 42; *Thornton v. Thornton*, 3 Rand., 179; *Jackson v. Stevens*, 16 Johns. Rep., 110; *Carson v. Cairns*, 20 John., 301; *Jackson v. Carey*, 16 John., 302.

(3) So where the husband and wife are divorced *causa præcontractus*, and the husband has sown the land previous to such divorce, he will be entitled to the

On the death of the wife in the lifetime of the husband, the real estate of the wife, of which she died seised, descends to her heirs-at-law. The husband's interest therein is at an end, unless he had by his wife a child born alive which could have inherited the estate if it had been alive at the death of its mother. In such case, the husband would have been entitled to a freehold estate in such inheritance during his life, by the curtesy. (1) To entitle the husband to an estate by curtesy, the wife must not only have a title thereto, but must have been actually seised, during the coverture, of an estate in fee simple, or fee tail; and he must have had by such wife a child born alive, which could have inherited * the estate. This would be the case in [*29] every instance where the estate was a fee simple, and in almost all the cases where it was a fee tail; but if the estate had been given to her, and the male heirs of her body, and the child born alive had been a female, such child could not have inherited the estate, and the husband could not be entitled to his curtesy. So, if it had been given to her and the heirs of her body, by her then husband, J. S., and, being a widow, she should marry A., and by him have a child born alive, yet such a child could not have inherited the estate, and her husband, A., could not be tenant by the curtesy. A man cannot be tenant by the curtesy of an estate in remainder or reversion, unless the particular estate be ended during the coverture. (2)

emblems; for, although the divorce is the act of the parties, yet the sentence which dissolves the marriage is the judgment of the law, *et judicium redditur in iudicium*. Oland's case, 5 Rep., 116, a.

See also *Mattocks v. Stearns*, 9 Vt. R., 326, *arguendo*. A lease by a husband of lands which he holds in the right of his wife, will operate so far in the tenant's favor as to entitle him to the emblems. 1 Tyler's Vt. R., 409; 2 Kent's Com., 131; *Rooney's case*, 2 Vern., 322.

(1) *De Grey v. Richardson*, 3 Atk., 469; *Gentry v. Wagstaff*, 3 Dev. N. C. Rep., 270; *Stodard v. Gibbs*, 1 Sumn., 263; *Sterling v. Penlington*, 7 Viner, 149. See also *Jackson v. Sellick*, 8 John. Rep., 202; *Clay v. White*, 1 Munf., 162; *Green v. Liler*, 8 Cranch Rep., 249; *Davis v. Mason*, 1 Peters' U. S. Rep., 503; *Smoot v. Leatt*, 1 Stew. Ala. Rep., 74.

(2) 4 Kent's Com., 27. To create an estate by the curtesy, four things must concur: marriage, seisin of the wife, issue, and death of the wife. The law, on the death of the wife, vests the estate in the husband without entry: his estate

Husband and wife are entitled to land in right of the wife, of which they are disseised, and the disseisor dies, and the land descends to his heir; the husband's right of entry upon the land is taken away. If the husband die before the wife, her right of entry is not taken away. (a) If the wife had been disseised before she was married, and after marriage the disseisor dies; in such case the wife's right of entry is taken away; for it is said that it was her folly to marry such a man as would not enter.

(a) Co. Litt., 248; 7 H. 7, 24.

commences with the birth of issue, and is perfected on the death of his wife. 4 Kent's Com., 28. But in some States the rule has been carried further. In *Bush v. Bradley*, 4 Day's Rep., 209, and again in *Kline v. Beebe*, 6 Conn., 494, it is said that it is sufficient for the claim of curtesy that the wife had title to the land, though she was not actually seised; and in New York it is held that there need not be an actual entry, or *pedis possessio*, of the land by the husband or wife during coverture, in order to entitle the husband to his tenancy, provided the *femme* was the actual owner. *Jackson v. Sallick*, 8 John. Rep., 202; and where she is the owner of waste or uncultivated lands, not held adversely, she is considered as seised in fact, though no actual entry was ever made. *Green v. Siter*, 8 Oranch, 249; *Davis v. Mason*, 1 Pet., 503; *Clay v. White*, 1 Munf., 162; *Smoot v. Lecatt*, 1 Stew., 590, *per DUNCAN, J.*; 8 Serg. & Rawle, 75; but a mere naked seisin by the wife, as trustee, will not be sufficient to make the husband tenant by the curtesy, although she has the beneficial interest in the reversion. *Chew v. The Commissioners of Southwark*, 6 Rawle, 160.

There must be issue born alive. *Marsellis v. Thalhimer*, 2 Paige, 35. As to what may be considered a birth, see Bouv. L. D., tit. Birth.

The actual seisin of the wife held necessary to curtesy in the following cases: *Orr v. Hollidays*, 9 B. Monr., 59; *Petty v. Malier*, 15 Ibid., 591.

Constructive seisin was held sufficient in the following: *Day v. Cochran*, 24 Miss., 261; *Stephens v. Hume*, 25 Ibid., 349; *Merritt v. Horne*, 5 Ohio (N. S.), 307.

The receipt of rents and profits sufficient: *Powell v. Gossom*, 18 B. Monr., 179.

In Pennsylvania dower and curtesy are incident to both legal and equitable estates. *Dubs v. Dubs*, 31 Penn., 149.

If a husband takes property devised for the benefit of his wife, as trustee, he cannot, after divorce, claim curtesy. *Schock's Appeal*, 33 Penn., 351.

It was held, in the case of *Vrooman v. Shepherd* (14 Barb., 441), that the seisin of the wife was sufficient to make the husband tenant by the curtesy, notwithstanding the possession of a vendee. The possession of a vendee cannot become adverse to the vendor until after the performance in full by him.

Wild lands held an exception to the general rule of actual seisin, in *Pierce v. Wannett*, 10 Iredell, 446.

It is a disputed question in New York whether the statutes of 1848 and 1849 abolished the husband's tenancy by the curtesy. It was held, in the case of *Bil-*

It is difficult to perceive more folly in the latter than in the former case. The true ground must be, that she did not enter herself before she was married; but if such a wife were a minor, and having been disseised, had not entered before marriage, and the disseisor die, and her husband die, she may enter. In any of the above cases, if the wife of the disseisor has been endowed of the lands, the right of the disseisee or his wife to enter is not taken away, for the wife of the disseisor is not in by descent;

lings v. Baker, 28 Barb., 343 (ROSEKRANS, J., dissenting), that those statutes abolished this estate of the husband. But it was held, in Hurd v. Casa, 9 Barb., 366, Chemung Special Term, by MASON, J., that the husband still had his curtesy; and an opinion to the same effect was given by Justice SUTHERLAND, in the case of Valence v. Vausch, 28 Barb., 633. See also Clark v. Clark, 24 Barb., 581.

How this estate is affected by the statute of 1860, concerning the rights and liabilities of married women, has not as yet been decided by the courts. See sections 10 and 11 of chapter 90, Laws of New York, 1860.

In Minnesota, "when a man and his wife shall be seised in her right of any estate of inheritance in lands, the husband shall, on the death of the wife, hold the lands for his life as tenant by the curtesy; provided that, if the wife, at her death, shall leave issue by any former husband, to whom the estate might descend, such issue shall take the same, discharged from the right of the surviving husband to hold the same as tenant by the curtesy." Stat. of Minnesota, ch. 36, p. 410, § 30.

In Mississippi, in case any married woman should die, leaving a child or children by a former marriage, or descendants of such child or children, and the husband surviving her should be entitled to curtesy by the rules of law, his curtesy in such case shall only extend to *one-third part* of the real estate owned by the wife at the time of her death, to be set apart and allotted to him according to the rules and remedy established for the allotment of dower. Rev. Code, Miss., sec. 5, art. 29, p. 337.

In Maine, when a married woman dies intestate, her property descends to her heirs; and administration and distribution may take place, as if she had not been married. R. S., Maine, 1857, ch. 61.

In Illinois, when any *femme covert* dies *intestate*, leaving no minor child or children, the one-half of her real estate descends to her husband, as his exclusive estate forever. Stat., Ill., of 1858, p. 1200, § 47.

In Pennsylvania, when a married woman dies intestate, leaving no minor child or children, nor the descendants of such living, the husband is entitled to her personal estate absolutely; otherwise her personal estate is to be divided between her husband and such minor child or children, share and share alike; and if such child or children shall be dead leaving issue, such issue is entitled to the share of the parent. Act of 1848; Dunlop's Laws of Penn., 1124, 1125. "Nothing in this act shall be deemed to deprive the husband of curtesy." Act of 1848, above.

she is in immediately by the husband, and is not the heir by a title. (a) (1)

By the tenure of gavelkind, it is not necessary that the husband should have by his wife any child to entitle him to curtesy.

[*80] * Were it not too late to agitate the question in Connecticut, after we have so long adopted the common-law idea on this subject, perhaps it might be successfully contended here, that the birth of a child was not necessary to entitle the husband to the curtesy; for our lands are holden under the charter of Car. II, by gavelkind, under which tenure the birth of a child is not necessary to entitle the husband to his curtesy. The tenure is not altered in this respect by any statute, as it is in case of dower and descent of lands: it would seem, therefore, as if it must remain as it originally was, unless usage to the contrary is to prevail.

By gavelkind tenure, lands descended in equal shares to all the male children, to the exclusion of the females. In this State we have a statute letting in females to inherit with the males; but if we had no statute upon the subject, would not the law of gavelkind descent be our law?

A *femme*, when *sole*, mortgages her estate, and then marries. She dies, and the mortgage was not redeemed during the marriage: the husband shall have his curtesy: the land is considered in equity as a pledge, and the mortgage does not alter the possession of the mortgagor. (2)

It has been a litigated question, whether a man could be a tenant by the curtesy of a trust estate. It seems to have been settled, when the doctrine of uses was in vogue, that a husband could not be tenant of a use, and as trusts were in the room of

(a) Co. Litt., 280.

(1) So if the wife claims by descent or devise, and dies before entry, the inheritance will go, not to her heir, but to the heir of the person last seised, and the husband will not have his curtesy. *Jackson v Jackson*, 5 Cow. Rep., 74. Where a *femme sole*, in contemplation of marriage, grants a term of seventy-five years in her real estate to a trustee, to hold for her use during coverture, and the marriage takes place and she has issue and dies, her husband is tenant by the curtesy. *Lowry v. Steele*, 4 Ohio Rep., 170.

(2) *Casborne v. English*, 1 Atk., 606; Chit. Eq. Dig., 1, 362.

uses, and indeed were the same thing revived under a new name, it was urged that there could be no curtesy of a trust; but by more modern decisions it has been settled that a husband can be tenant by the curtesy of a trust estate. (a) A husband cannot be tenant by the curtesy of the separate real estate of the wife.

(b) (1)

When a woman leases her lands for rent, and marries, the husband is entitled to the rent, for this comes in lieu of the improvement of the land, and is indeed the usufruct: * and if the husband die, and rent be in arrear, which accrued [*81] during coverture, such rent belongs to the executor of the husband. (2)

If a *femme lessor* marry, the husband is entitled to receive the rent; and it is laid down in Palmer, 210, that a payment to the wife shall not discharge the lessee, although he had no notice of the marriage. Such a decision is destitute of principle. When, by contract, a person is bound to pay money to another, the payment is well made to the person with whom the contract is made, until the debtor has notice that another has a right to receive the money. This is the rule in all other cases; and I can perceive no reason why this case should be an exception to a rule so reasonable. If there were any rent in arrear that accrued before coverture, this rent, like all other choses, would belong to her upon the principles of common law; but, by a statute of Henry VIII, such arrears are given to the husband. (c)

(a) Doct. and Stu., 208; Park., 467; Dyer, 9; 4 Inst., 87.

(b) 3 P. Wms., 289; 1 Atk., 607; 2 Ibid., 47; 5 Ibid., 286; 1 Ves., 288.

(c) 1 Roll.

(1) Otway v. Hudson, 2 Vern., 583; Williams v. Wray, Ibid., 681; Sweetapple v. Benden, Ibid., 536; Cunningham v. Moody, 1 Ves., 174; Dodson v. Hay, 3 Bro. Ch. Rep., 404; Houghton v. Hapgood, 13 Pick., 104; Cruise Dig., I, 118.

In Virginia, by the statute, the husband has his curtesy in a trust estate. 1 R. C., 118. So in Maine. 1 Sumn., 128.

In Vermont, the nature of the estate of which the husband may be tenant by the curtesy is regulated by statute, and it is believed that a trust estate would not come within the statute. Rev. Stat., Vt., 1832.

In Pennsylvania, dower and curtesy are incident to both legal and equitable estates. Dubs v. Dubs, 31 Penn., 149.

(2) And the receipt of rents and profits is a sufficient seisin of the wife to entitle the husband to his curtesy. Pitt v. Jackson, 3 Bro., 51; 5 Madd. Rep., 248. So held in Powell v. Gosson, 18 B. Monr., 179.

At common law no laches are imputable to a wife, to bar her entry on land descended to her; yet, for non-performance of a condition annexed to an estate, laches are imputable. As when a wife is enfeoffed, reserving rent; and, for non-payment, a right of reentry accrues to the grantor; if the rent be not paid, she loses her estate. (a)

In this and the preceding chapter we have seen that, by marriage, the whole personal estate of the wife in possession is, by law, transferred to the husband; that her personal estate in action is entirely at his disposal during the coverture; that he cannot devise such estate; and, in event of his death, it survives to her, and, after paying her debts, must be distributed to her next of kin, if a certain statute had not vested in the husband an absolute title to the residuum after debts are paid; that her chattels real are at his disposal during coverture, liable to his debts, and [*32] on her death belong to him *absolutely, as husband, and not as administrator; neither can he devise them from her; that he is entitled to the usufruct of her real estate during the coverture, and may be entitled, on the death of his wife, to her real estate, during his life, by curtesy.

Where husband and wife are joint tenants for life, and the husband sows, and dies before severance, who is entitled to the emblements? the husband's executor or the wife? Respecting this question, the authorities are contradictory. The principle which governs in the case of emblements, I apprehend, must settle this question, without difficulty. In all other cases, if the tenant sow, and his interest in the estate is determined before severance, and this could not be foreseen by him, or was not done by his own act, the tenant has the emblements, and not the owner of the land. If tenant at will sow, and the lessor determine the estate, and the tenant at will die, his executor has ingress, &c., to take the emblements, and not the lessor; but if tenant at will, by his own act, had determined the estate, the lessor would have been entitled. (b) If tenant for years sow, and his estate determine before severance, the reversioner has the emblements; for this he might have foreseen. If tenant for life

(a) Co. Litt., 146.

(b) Co. Litt., 55; Cro. Eliz., 61; 1 Roll. Ab., 737; Noy., 149; Cro. Car., 515; Godb., 189; Stiles, 370.

sow, and die before severance, his death is the act of God, and the tenant could not have foreseen it; and, in that case, the executor of the tenant for life has the emblements. In this case the husband sows; he could not have foreseen his own death, and, of course, for the same reason as in the other cases, his executor is entitled to the emblements. If a *femme sole*, seised in fee, sow, marry, and the husband die before severance, the widow is entitled to the emblements; not because the land is now at her control; but the case of emblement is like choses in action, not reduced to possession until severance. (1)

* In the State of Connecticut, seisin in the wife is not necessary to entitle the husband to the estate by the cur- [*38] tesy. (2) In 4 Day, 305, there is a case where this point was determined. The opinion given on that question, in which seven of the judges concurred, was as follows:

"It is said that unnecessary departures from the common law are not to be favored; that, by such means, everything is rendered uncertain. I am fully of opinion that few maxims of our law are more important than that of *stare decisis*; but it must be acknowledged by all, that our system of law respecting real property is, in many respects, very different from the English system. We have, in some instances, when we have adopted the principles of the English law, extended them to cases which, by the adjudications of the English courts, have not been supposed to fall within the governing principle: in others, we have

(1) There seems to be but one instance where the husband and wife can be considered joint-tenants: that is, where an estate is conveyed to a man and woman who are not married, and who afterwards intermarry; then, as they originally took by moieties, they will continue to hold by moieties after marriage. *Moody v. Moody*, 1 Inst., 187. In the other cases where a title vests in husband and wife, which, did not that relation exist between them, would constitute them joint-tenants, they are seised by entireties, being but one person in law. Cruise Dig., tit., Joint-tenancy *passim*. The learned author himself (p. 23) seems to be of opinion that the husband and wife cannot hold as joint-tenants. In this instance, as the determination of the tenancy could not have been foreseen by the husband, his executor is undoubtedly entitled to the emblements. As to the rule that husband and wife cannot be joint-tenants, see note 3, marginal, page 23.

(2) See Kent's Com., iv., 30. And the same doctrine was afterwards held in *Kline v. Beebe*, 6 Conn. Rep., 494.

adopted entirely different principles; and, in all such cases where this has been done, which are *pari ratione* with those already settled, if we reject our own, and adopt theirs, we shall mar the symmetry of our law. The preservation of symmetry in our law system, I also view as a most important consideration. In England, it is not sufficient that a man is proprietor of real property, and has a perfect right to it when he dies, to cause it to descend to his heir-at-law. No: he must be actually seised thereof. The maxim is, *seisina facit stipitem*; and the person that is heir to that property will be heir to him last seised. If A should die, who owned Whitesacre, which descended to him from his father, but has not been actually seised, leaving B, a brother of the half blood, and C, a sister of the whole blood, this estate cannot descend to C, his sister and heir; for B, being of the half blood, cannot, by their law, be heir to his brother; yet the estate will descend to B, who is heir to his father, who was last seised. If A had been seised, the estate would [*84] have descended to C.* The maxim, *seisina facit stipitem*, is an unyielding maxim of their law, and governs the descent of property. But this is not our law. It is settled that it shall descend to the heirs of him who owns the property, whether he was seised or not. Seisin directs the descent of property with them: ownership with us. By the English law, a devise will not operate on real property of which the deviser is disseised. Seisin is an indispensable requisite to give effect to the devise. A devise by our law is good, though the deviser is disseised. Seisin is necessary in their law, and ownership is sufficient in our law. We have always considered ownership as giving a right to possession of real property, as much so as ownership of personal property. Ownership in the one case draws after it the possession, as much as in the other case. Whenever, with us, a right of possession is lost, all title and ownership is lost. So the statute of limitation respecting lands has always been construed. The statute, in the words of it, does not take from the original proprietor his title; it only tolls his right of entry. Yet this statute has always been considered as barring all claim of title, whilst the same words in the English statute, have been considered, not as having any

effect on the title, but only on the right of entry; and the land may be recovered, by a form of proceeding proper for such case. The English law distinguishes between a right of possession, and a right of property; but our law does not. Wherever there is a right to real property, there is, of course, a right of possession; and the statute, which takes away the right of possession, takes away the right of property. And this is the reason why this statute has received a construction, altogether different from the construction given to the English statute; and this is perfectly analogous to every other case of real property in this state. Wherever you find a right of property, *there you find a right of possession; and all the consequences of owner- [*35] ship attending it, which you find in England, where there is an actual seisin. And on the other hand, where there is no right of possession, there is no ownership. So, in this case; Mary Gold-ear, the wife, had title to the land; and though not actually seised, her husband acquired the same right, on her death, as if she had been seised. Since seisin is not necessary in case of descent to the heirs, neither is it necessary to pass lands by devise. Why should it be thought necessary to the husband's title by the curtesy? The decision of the court in this case, is no departure from fixed rules and precedents. The English law respecting the efficacy of seisin, has long since been departed from; and to adhere to it in this case, would mar the symmetry of our law. The English law requires the seisin of the wife; it therefore became a question, whether the husband could have the curtesy. In the following case, A devised Whiteacre to his executors for the payment of his debts, and until his debts were paid. He had an only child, B, a daughter; she married C; the executors entered; a living child was the fruit of the marriage, and B died; the court determined that the husband was entitled to the curtesy.

In England, if persons marry who by law are incapable to contract matrimony together, and the wife die before the marriage has been annulled by sentence of court during her lifetime, the husband is entitled to his curtesy. Thus, where the parties are related to each other within the Levitical degrees; such marriage may be annulled during the life of the parties; and after

sentence of court, it is considered as void *ab initio*; and the issue are bastardized. In Connecticut, such persons cannot marry together, except that a widower may marry the sister of his deceased wife; the marriage is utterly void, without *any [*36] proof from the sentence of a court; so that there can be no curtesy in case of such marriage. This must be the case in every State in the Union, where such marriages are made void by law, and a sentence of some court is not necessary to furnish evidence of their being void. Where the law forbids such marriages, and inflicts a penalty upon the persons so marrying, but does not declare them void, I should suppose that the issue of such marriages were legitimate, and that the husband would be entitled to his curtesy."

[*37]

*CHAPTER III.

THE WIFE'S PORTION OF HER HUSBAND'S ESTATE ON HIS DEATH,
UNDER THE STATUTE OF DISTRIBUTIONS: HER PARAPHERNA
LIA: HER RIGHT OF DOWER IN HIS REAL ESTATE: AND OF
JOINTURE.

WE will now inquire what advantages the wife may gain, eventually by marriage, in point of property, during the coverture. She gains nothing during his life; but upon the death of her husband intestate, she is entitled to one-third part of his personal property, which remains after paying the debts due from the estate of the husband, if he left any issue; but if he left no issue, she is entitled to one-half of the residuum of the personal estate, after the debts are paid; but the husband, if he had chosen so to do, might have devised such estate from her. This right of the wife is founded upon the statute of distributions, in the English law, and I believe universally adopted in the United States. (1) There is one species of personal property in which

(1) It is now provided by statute, in Vermont (Comp. Stat., 365), that, if a person die leaving no issue, his widow shall be entitled to the whole of his estate forever,

she acquires a different interest from that which she may acquire in his other property, which is termed *paraphernalia*. This is of two kinds: the first consists of her beds and clothing, suitable to her condition in life; the second consists of her ornaments and trinkets, such as her bracelets, jewels, her watch, rich laces, and the like. As to the former, they cannot, with propriety, be considered as his estate, for they are not liable, upon the principles of the common law, without any aid from any statute, *to the payment of his debts, and never ought to be inventoried as part of his estate: neither can they be [*38] devised from her by will. As to the second kind, these cannot be devised from her by the husband, though he may take them from her, and dispose of them during the coverture. (1) On the

if it shall not exceed the sum of one thousand dollars. If the estate exceed that sum, the widow is entitled to one thousand dollars and one-half of the remainder of the estate. The remaining part of said estate descends in the same manner as the whole would if no widow had survived; and if the deceased shall have no kindred, who by law might inherit his estate, the widow shall be entitled to the whole.

By this statute the widow becomes entitled to an estate in fee, which passed to her heirs by descent, and which she may dispose of at pleasure.

In New York, "At the decease of the husband or wife intestate, leaving minor child or children, the survivor shall hold, possess and enjoy all the real estate of which the husband or wife died seized, and all the rents, issues and profits thereof during the minority of the youngest child, and one-third thereof during his or her natural life." Laws of 1860, New York, ch. 90, § 11.

A chose in action owned by an individual at the time of his death, belongs to his personal representatives after his decease, and his widow has no authority to assign the same, in the absence of any proof that she is executrix or administratrix. There is no presumption that the widow occupies the relation of personal representative of her husband. *Heidenheimer v. Wilson*, 31 Barb., 636.

(1) "Jewels purchased by the husband, and worn by the wife with others belonging to her husband, become her paraphernalia in the absence of evidence to the contrary; but family jewels, merely worn by the wife, do not become part of her paraphernalia. *Jervoise v. Jervoise*, 17 Beav., 566.

The term *paraphernalia* signifies something to which she is entitled, besides, or over and above her dower, and what shall be so considered, irrespective of the husband's debts, is provided for, and to some extent designated by the statutes of the several States.

Certain articles are enumerated by the statute of Pennsylvania, and all wearing apparel. *Purd. Dig.*, 194.

In Massachusetts it is provided for by statute. In Vermont, all wearing apparel,

death of the husband, they vest in the wife, liable, indeed, to be taken by the executor of the husband, for the payment of his debts, provided that there are not sufficient assets beside to discharge his debts, (a) but the whole of the personal estate must be exhausted, before any resort can be had to them by the executor; her right must yield to that of creditors; but in no instance, to that of volunteers, for her *paraphernalia*, can never be taken to pay legacies. If the debts be paid without the aid of the *paraphernalia*, they become hers absolutely, and are not reckoned to make any part of her share to his personal estate, when he dies intestate.

She is often viewed as a creditor to her husband's estate, in respect of her *paraphernalia*; as when the husband, in his lifetime, being under the necessity of raising money, pledges her jewels, &c., and dies, leaving personal property more than sufficient to pay his debts, she shall have aid of his personal estate to redeem her *paraphernalia* thus pledged. (b) So too, where real estate is devised for the payment of his debts, and the executor takes the *paraphernalia*, on account of a deficiency of assets in the personal funds to pay the debts, she shall have the same right against this estate so devised for the payment of debts, to refund to her the real value of her *paraphernalia*, as a creditor can have, who is not paid his debt, for the want of assets. Where a real estate is given in trust (whether by deed or will) for the payment of debts, if her *paraphernalia* be taken by the executor, she shall be considered as a creditor to the value of her *paraphernalia*. So

(a) 3 Atk., 370.

(b) 3 Atk., 365.

including that of minor children, and the widow's ornaments, according to the estate and degree of her husband, and such provisions and other articles as shall be necessary to be consumed in the subsistence of the family of the deceased, under the direction of the Probate Court, shall not be assets or included in the inventory. Comp. Stat., 340.

But the property in wearing apparel bought for herself, by a wife living with her husband, out of money settled to her separate use before marriage, and paid to her by the trustees of the settlement, vests by law in the husband, and it is liable to be taken in execution for his debts. Hurlstone & Wolmsley's Rep., 23. With respect to its liability to be taken in execution, in most if not all the States, such property would undoubtedly be exempt to a certain extent.

toc where the personal estate has been exhausted by specialty creditors, who might have gone against the heir, if they had chosen so to do, equity will direct that the wife shall stand in the place of specialty creditors as to real assets. (a) On application to chancery, the court will not suffer the *paraphernalia* of the wife to be taken by a specialty creditor, if there be real assets sufficient in the hands of an heir or devisee. (1)

If the wife never take her *paraphernalia*, the executor has no claim upon them, as part of the estate of the testator, any more than a stranger, unless he wants them, through a deficiency of assets to pay debts.

In some of the States the real estate of the husband constitutes a fund for the payment of debts of every description, after the personal estate is exhausted for that purpose. This is done in Connecticut, by the executor's application to the court of probate, in the district where the deceased dwelt; who, by law, can give power to the executor to sell the real estate of the deceased, or so much of it as will raise the necessary sum for the payment of the debts. In some of the States the application is to the legislature, who give the same power; and the money arising from the sales is assets in the hands of the executor. Would it not, therefore, be necessary, in such States, that the whole of the real as well as of the personal estate should be exhausted, before the executor could resort to the *paraphernalia* of the wife for the purpose of paying debts?

(a) 3 P. W., 80, in notes; 1 Atk., 369; 1 P. W., 729, 730; 2 Ibid., 544.

(1) The courts sometimes go great lengths in protecting the right of the wife to her *paraphernalia*; thus real estate, charged with the payment of debts, will be applied before the widow's *paraphernalia*. *Boynton v. Boynton*, 1 Cox, 106. And it shall never go to satisfy legacies. *Snelson v. Corbett*, 3 Atk., 369. And she is held to stand as a creditor to the husband's estate to the value of her *paraphernalia*. So that, when it is pledged, the estate will be liable to redeem the pledge. *Worltrey v. Worltrey*, 2 Atk., 77; *Graham v. Londonderry*, 3 Ibid., 393. But it is said, in *Parker v. Harvey*, 4 Bro. P. C., 609, that when a man's real and personal estate is charged by his will with the payment of his debts, and afterwards turn out insufficient, his wife's jewels and *paraphernalia* should be sold towards making good the deficiency. As to the rights of the wife generally in this respect, see 1 Chitty's Equity Digest, 524.

By the death of the husband the wife becomes entitled, during her life, to one-third part of the real estate of inheritance of which the husband was seised during the coverture. This estate is termed *dower*. (1) Of this the husband cannot deprive

(1) Litt., sec. 36; Perkins, sec. 310; New York Revised Statutes, vol. 1, p. 740, sec. 1; Park's Treatise on the Law of Dower, 5; Chase's Statutes of Ohio, vol. 2, p. 1314; 1 Virginia R. C., 288; Mass. Rev. Stat. of 1835, part 2, title 1, ch. 60, sec. 1; New Jersey Stat., 1799; Elmer's Dig., 143; Revised Laws of Missouri, 1835. In Missouri the wife is entitled to dower, in leasehold estates of twenty years or more. In Vermont the wife's right of dower is to those lands of which the husband dies seised. Rev. Stat., Vt., 1839, p. 289. So in Connecticut, *post*, page 57; and Tennessee, North Carolina and Georgia. Winstead v. Winstead, 1 Hayw., 243; Stat. of Georgia, 1826; Combs v. Yancey, 4 Yerger's Tenn. Rep., 218.

In Ohio, the widow has, in addition to the one-third part of all lands and tenements, &c., of which her husband was seised of an estate of inheritance during coverture, "one-third part of all the right or interest that her husband, at the time of his decease, had in any lands and tenements held by bond, article, lease or other evidence of claim, and she shall remain in the mansion-house of her husband free of charge for one year after his death, if her dower be not sooner assigned her." Statutes of Ohio, 1860, ch. 38.

In Illinois, the widow is entitled to one-third of his lands and equitable estates, and all real estate of every description contracted for by the husband in his lifetime, the title to which may be completed after his death. She is also entitled to dower in the lands of her husband mortgaged before marriage and those mortgaged after marriage for the purchase-money, against everybody but the mortgagee. Stat. of Ill., 1858, vol. 1, pp. 151, 152.

Dower and curtesy are expressly abolished, as before existing, in Indiana, and statutory provisions made in lieu thereof. R. S., Ind., 1852, vol. 1, ch. 27, sec. 16.

The Code of Alabama, 1852, sec. 1991, provides that, "if any woman having separate property survives her husband, and such separate property, exclusive of the rents, income and profits, and inclusive of the increase of slaves, is equal to or greater in value than her dower interest and distributive share in her husband's estate, estimating her dower interest in his lands at seven years' rent of the dower interest, she shall not be entitled to dower in or distribution of her husband's estate." And sec. 1992, "if her separate estate be less in value than her dower, as ascertained by the rule above, so much must be allowed her as would, with her separate estate, be equal to her dower and distributive share in her husband's estate, if she had no separate estate."

No decision has been made by the courts as to the effect of the New York statute of 1860 concerning dower. See sections 10 and 11 of Laws of 1860, ch. 90, and also note 1, marginal, p. 1, ch. 1, *ante*.

The widow's claim of dower is favored by the courts, and they have always been astute in protecting this right to the small pittance which the common law gave her

her by will; nor can he by any conveyance, unless her consent be manifested by joining with him in the convey-

in the estate of her husband after his death. *WALWORTH*, Chancellor: *Church v. Bull*, 2 Denio, 431.

And a conveyance by the husband just before marriage, for the mere purpose of defeating dower, does not defeat it. *Cranson v. Oganon*, 4 Mich., 230; 5 John. Ch., 482; *Brewer v. Connell*, 11 Humph., 500.

In Arkansas, a widow is entitled to dower in the lands, slaves and other personal property of her deceased husband. *Menifee v. Menifee*, 3 Eng., 9. The Legislature of California has done away with the common-law right of dower, and substituted a half interest in the common property. *Compiled Laws of California*, 1850, 1853, ch. 147, sec. 11; *Beard v. Knox*, 5 Cal., 252.

The equity of redemption held to be equal to an estate in fee simple, and the widow entitled to dower in such estate. *Denton v. Nany*, 8 Barb., 618. In Pennsylvania, dower and curtesy are incident to both legal and equitable estates. *Dube v. Dube*, 31 Penn., 149.

Where a conveyance is made to one who, at the same time, executes a mortgage for the purchase-money, dower does not attach as against the mortgagee and his assigns, but as against all others it does. *Young v. Tarbell*, 35 Maine, 509. And the widow is dowerable only of an equity of redemption. *Moore v. Rollins*, 45 Maine, 493; *Stewart v. Beard*, 4 Md. Ch. Decis., 319; *Henegan v. Harlee*, 10 Rich Eq (S. C.), 285.

Where a statute gave a right of dower in equitable estates, it was held that a widow was not entitled to dower in an equity of redemption, where the mortgage was made previous to the enactment of the statute. *Hopkins v. Frey*, 2 Gilman, 359. In Tennessee, held, that the widow was not dowerable of lands which her deceased husband had conveyed by mortgage, because he did not die seised and possessed of them. *McIver v. Cherry*, 8 Humph., 713. So also in the case of *Blair v. Thompson*, 11 Gratt. (Va.), 441; *Cheek v. Waldrum*, 25 Ala., 152. Where land is mortgaged by the husband and the conditions broken before marriage, and the equity of redemption released by the mortgagor during coverture, his widow is not entitled to dower. To entitle the widow to dower, her husband must have been seised of a legal estate of inheritance during coverture, or of an equitable estate at his death. *Rands and wife v. Kendall*, 15 Ohio, 671. Held, in *Taylor v. Fowler*, 18 Ohio, 567, that a judicial sale does not divest the wife of her dower. A house was erected upon an unimproved lot by the husband. A mechanic's lien was perfected upon it, execution obtained against the husband, and a sale made in pursuance thereof. Held, that the widow was entitled to dower in both house and lot. *Bishop v. Boyle*, 9 Ind., 169. Where land is taken for a public use by a corporation, and upon compensation made, the widow will not be entitled to dower on the death of her husband. The right to dower is inchoate during the life of the husband, and, before it vests by his death, the legislature may make any regulation in regard to it, although it divest her right to dower. *Moore v. City of N. Y.*, 4 Sandf. S. C. R., 456; *S. C.*, 8 N. Y., 110; *Groyne and wife v. Cincinnati*, 3 Ohio 24. Partnership

ance. (1) It is not necessary that there should be an actual seisin [*40] of the husband; a seisin in law* is abundantly sufficient; (2)

property is liable to the payment of partnership debts in equity before the widow of a partner can claim dower, and then it is limited to the surplus. *Galbraith v. Dodge*, 18 B. Monr., 634; *Goodburn v. Stevens*, 1 Md. Ch. Dec., 420; *Summer v. Hampson*, 8 Ohio, 324. Held, in the case of *McDonough v. Hepburn*, 5 Florida, 568, that the wife is not entitled to dower in shares of stock in a land company, which the husband had disposed of during his life. Stock in a railroad company is real estate, and held subject to the widow's dower. *Price v. Price's heirs*, 6 Dana (Ky.), 107.

Where A entered into an executory contract with B for the purchase of land, and paid therefor a part of the purchase-money, and then assigned his right to a third person and died, held that his widow was not entitled to dower, at common law. *Pritts v. Ritchey*, 29 Penn., 71 (Lewis, Ch. J., dissenting). See also *Owen v. Robbins*, 19 Ill., 545. Held, in *Thompson v. Thompson*, 1 Jones (N. C.), 430, that a widow is entitled to dower in land covenanted to be conveyed to her husband; also in *Reed v. Whitney*, 7 Gray (Mass.), 533. Under the statute of 1791, in South Carolina, taking away survivorship in joint-tenancies, the widow of a deceased joint-tenant is entitled to dower in his portion of any land held by him in joint-tenancy during the coverture. *Reed v. Kennedy*, 2 Strobbart, 67. The wife is dowable of a quarry or bed of ore, when opened and worked by the husband. *Billings v. Taylor*, 10 Pick., 460; *Stoughton v. Leigh*, 1 Taunt., 402; *Coates v. Cheever*, 1 Cow., 460. Where the husband aliens, the widow is not dowable of the enhanced value of the property by reason of the erection of buildings and other improvements made by the alienee, but of the value of the land at the time of the alienation. *Barney v. Frowner*, 9 Ala., 901. But she must suffer any loss which may accrue from his waste or neglect, depreciating the value of the property. *McClanahan v. Porter*, 10 Mis., 746. And it was held, in the case of *Johnson v. Van Dyke*, 6 McLean, 422, that she was entitled to the natural enhancement in value of the land.

(1) *Matthews v. Matthews*, 1 Edwd. Rep., 565; *Rowe v. Hamilton*, 3 Greenl. Rep., 63.

(2) Bro., tit. Dower, pl. 75; Litt., § 448; Perk., 376; 1 Cruise's Dig. 122, 187; *Dunham v. Osborne*, 1 Paige, 634. As to what is sufficient evidence of her being seised. See 1 Caines' Rep., 185; 2 John., 119; 2 Serg. & Rawle, 566. Although the husband did not die in possession of the land, the widow is entitled to dower. *Galbraith v. Green*, 13 Serg. & Rawle, 85. But possession of the land by the husband, claiming ownership, is *prima facie* evidence of seisin, to entitle the widow to dower. *Jackson v. Waltermine*, 7 Cow., 353. But she is not entitled unless the husband was seised during coverture, either in fact or in law, of an estate of freehold. *Shoemaker v. Walker*, 2 Serg. & Rawle, 556. And where the seisin of the husband is instantaneous, or passes from him *eo instanti* that he acquired it, the wife cannot have her dower. *Stow v. Tift*, 5 John. Rep., 458. Nor will a mere technical seisin of the husband, without any beneficial interest in the estate, entitle her. *Derush v. Brown*, 8 Ohio Rep., 412.

As to instantaneous seisin, see also *Gammon v. Freeman*, 31 Maine, 243, and

and the estate must be such a one as her issue, if she had any, might have inherited. (1)

If the husband after marriage, should lease for years, all his estate by the English law, the wife must be endowed, though the term has not expired; and after her estate is at an end, if the term has not expired, the lessee shall again have the land of which the wife was endowed. I apprehend the law in Connecticut must be the same, for although a wife be not endowed of the land which the husband sells; for, of such he did not die seised or possessed, which our law requires; yet in this case, he did die seised and possessed, in the eye of the law; for the lessee's possession was his possession. (a) (2)

The heir-at-law, within a certain limited time, is obliged to assign to her, her dower; and if he neglects, is compellable so to do by legal process. (3)

In Connecticut, the law is different in some respects. The variations in our law from the common law are produced by a certain statute, which gives dower in no estate, but such of which the husband died seised. Dower is also set off to the widow by the judge of probate, who appoints two or three judicious freeholders to set it off to the widow, directing them to

(a) Co. Litt., 46.

Cunningham v. Knight, 1 Barb., 399. But the demandant must show that the mortgage and deed constituted but one transaction. *Grant v. Dodge*, 43 Maine, 489. Held, in *Thorndike v. Spear*, 31 Maine, 91, that the seisin of demandant's husband is established by proof, that he conveyed the premises by warranty deed, and that his grantee conveyed the same by warranty deed to the tenant.

(1) The statutes of New York and Virginia omit the condition in respect to the wife's issue.

(2) 4 Kent's Com., 63-65; Bac. Abr., tit. Assignment of Dower. *Thayer v. Thayer*, 14 Vt. Rep., 107.

(3) *Bank of U. S. v. Dunseth*, 10 Ohio Rep., 18; *Ward v. Ketts*, 12 Wend., 137; *Jackson v. Churchill*, 7 Cow., 287; *Jackson v. Donaghy*, 7 John. Rep., 247; *Barnet v. Barnet*, 15 Serg. & Rawls, 71.

It is not required that the widow demand dower before bringing ejectment. *Elliott v. Mosier*, 7 N. Y., 201. But held in Maine, that "An action for dower cannot be maintained before a demand has been made to assign the dower claimed." *Ford v. Erskin*, 45 Maine, 484. A parol assignment of dower by a guardian held good, in *Curtis v. Hobart*, 41 Maine, 230. Where land was aliened by a husband during his lifetime, admeasurement of dower must be made according to its value at the

return their doings to the court of probate; which return, if accepted by the court, establishes the widow's right to the land set off. (1)

This estate in dower may be barred several ways; as where the husband is an alien, &c. (2) A wife who is an alien cannot be endowed, unless naturalized by act of parliament. (3)

time of its conveyance. *Parks v. Hurdy*, 4 Bradf. 15. See R. S., N. Y. (5th ed.), tit. 3, p. 33, § 21.

So also in Illinois, the widow's dower and share of personalty is to be allowed in the lands of an intestate without regard to advancements, and the balance only, after deducting the widow's share, is estate for distribution. *Grattan v. Grattan*, 18 Ill., 167.

A widow, though entitled to dower, has no claim to occupy any part of the estate until her dower has been assigned. *Bolster v. Cushman*, 34 Maine, 428.

(1) In Vermont, where the widow is entitled to dower, in the real estate of her husband, she may at any time after his decease, make application to the probate court, to have such dower assigned, who thereupon appoints three disinterested freeholders, as commissioners, to set out the dower by metes and bounds, where it can be done without injury to the estate. R. S., Vt., p. 290.

(2) See *Priest v. Cummings*, 16 Wend., 617.

A sale of land under a testamentary power for the payment of debts, discharges the land from the dower of the testator's widow. *Mitchell v. Mitchell*, 8 Penn., 126. Dower is barred by a valid sale and conveyance of land by the county auditors, for non-payment of taxes. *Jones v. Devoe*, 8 Ohio (N. S.), 430. So when land is taken under a law of the state for public purposes. *Moore v. Mayor, &c.*, of New York, 4 Seld. (8 N. Y.), 110; *Gwynne v. City of Cincinnati*, 3 Ohio, 24. An infant femme covert cannot bar dower, by joining her husband in a conveyance. *Cunningham v. Knight*, 1 Barb., 399. Held in *Stevens v. Owen*, 25, Maine 94, that the wife does not release her dower by joining her husband in a conveyance of land, unless she use apt words to express an intention on her part. Held, *contra*, in *Smith v. Handy*, 16 Ohio, 191; *Durtin v. Steele*, 7 Foster (N. H.), 431.

An assignment in insolvency by a debtor, under compulsory process, and a conveyance by his trustee, was held not to divert his wife's right of dower. *Eberle v. Fisher*, 13 Penn., 526.

A widow is not barred of her claim for dower against a mortgagee who has foreclosed (she not having joined in the deed), by her release of dower to the purchaser of the equity of redemption. *Littlefield v. Crocker*, 30 Maine, 192. See also *Ulp. v. Campbell*, 19 Penn., 361. Before dower has been assigned, the widow may release, but cannot convey it. *Green v. Putnam*, 1 Barb., 500; *Lamor v. Scott*, 4 Rich. (S. C.), 516; *Moore v. New York*, 4 Seld. (8 N. Y.), 110; *Mattock v. Lee*, 9 Ind., 298. The widow is entitled to occupy the dwelling house of her husband for a length of time after his death, and before assignment of dower, which is regulated by statute in the different states. In New York, the "widow may tarry in the chief house of her husband forty days after his death, without being liable to pay any rent for the same." R. S., N. Y. (5th ed.), tit. 3, p. 33, § 17.

(3) *Kelly v. Hamilton*, 2 John. Cas., 29. But in several states the rule is different; in Maryland an alien widow, who married in the United States, and resided

She may be endowed, if she is created a denizen, of all the lands of inheritance of which the husband was seised at the time she became a denizen, and of those which he afterwards purchased; but not of those which he conveyed away before she was created a denizen. (1)

*A woman who is by force carried away, and married against her consent, will not be entitled to dower, even if she afterwards consents to live with him who carried her away [*41] by force. A statute of Richard II disables her from claiming dower. The real ground of her disability, I apprehend, is, that such a marriage is void, notwithstanding some dicta to the contrary. For a marriage ought never to be deemed valid where there is no consent. If this is a correct view, the statute is only in affirmance of the common law. (2)

Dower may also be barred by the elopement of the wife with an adulterer. This is not a provision of the common law, but by the statute of Westminster. (3) Yet, if there is a voluntary

here at the decease of her husband, was admitted to dower. *Buchanan v. Deshorn*, 1 Har. & Gil, 280; the widow of an alien resident who dies in Missouri is also entitled. *Stokes v. O'Fallon*, 2 Mo. Rep., 32. By Mass. R. S., of 1835, and in New Jersey, by statute of 1799, an alien widow takes dower. In New York, the alien widow of a natural born citizen, who was an inhabitant of the state at the passage of the act of 1802, enabling aliens to purchase and hold real estate, is dowable. *Priest v. Cummings*, 16 Wend., 617; but see *Connolly v. Smith*, 21 Wend., 59; *Sutliff v. Forgey*, 1 Cow., 89; S. C., 5 Cow., 713; *Mick v. Mick*, 10 Wend., 379. In Vermont, the statute gives the widow of every deceased person dower, and consequently aliens are not excluded. E. S., Vt., 1839.

(1) By naturalization, the uninheritable blood of the alien becomes purified and made *inheritable*. All previous disabilities as to taking or transmitting real estate are removed, and any defective or forfeitable title, by reason of alienism, becomes perfect and indefeasible. *Jackson v. Beach*, 1 John. Ca., 298; *Jackson v. Green*, 7 Wend., 335. The wife is dowable of an estate of *inheritance* of which any issue which she might have had could by possibility have been heir. 4 Kent's Com., 35. By naturalization, her issue would be capable of inheriting, whether born before or after naturalization, and lands purchased before may be held and transmitted as well as those purchased afterwards. But in the case of denization it is different, as the effect of denization is simply perspective. *Priest v. Cummings*, 16 Wend., 617.

(2) Bac. Abr., tit. Dower, F.; and see *Stegell et al. v. Stegell's administrators et al.*, 2 Brock., 256; *Cochran v. Libbey*, 6 Shepl., 39.

(3) This statute (13 Edward I) was reenacted in New York in 1787, and has

reconciliation on the part of the husband and wife, she shall be entitled to dower. If the reconciliation was the effect of ecclesiastical coercion, she would not be entitled. (1) 2 Ins., 435. Such elopement is no forfeiture of jointure, nor will it discharge the husband from a performance of marriage articles. (a) Elopement with an adulterer, though a bar to dower, is no discharge of articles of agreement to settle a jointure. (b) (2) The statute of Westminster, which makes elopement with an adulterer a bar of dower, has made no provision respecting jointure and marriage articles. Jointure was not then known, and articles seldom used. But the most usual method of barring dower is, by settling a jointure on the wife in lieu of dower. If a suitable jointure be settled on the wife before marriage, this will prevent

(a) 13 Ves., 445.

(b) 3 P. Wms., 269.

been modified in the revised code. The same provision is made by statute in Connecticut; and, *that the wife has eloped with an adulterer*, is now probably a good bar of dower in every State in the Union. 1 Swift's Dig., 86; 1 Dane's Abr. of Am. Law, 672, 676; *Coggswell v. Tibbets*, 3 N. H. Rep., 41; Statutes of Ohio, 1824, sec. 6; Revised Laws of Illinois, 1833. In *Hetherington v. Graham*, 6 Bing., 135, adultery is held a bar to dower, though the wife does not elope with the adulterer. It will bar her dower if she leaves her husband voluntarily, and afterwards lives in a state of adultery. In New Jersey, a decree of divorce for the fault of the wife forfeits her dower. So does a voluntary elopement with an adulterer, or consent to a ravisher, take away her right of dower and jointure, unless the husband be voluntarily reconciled to her and suffer her to live with him. *Elmer's Dig.*, 145: see also *Thayer v. Thayer et al.*, 14 Vt. Rep., 107.

In case of a divorce for the adultery of the husband, the wife has her dower. *Waite v. Waite*, 4 Comst. (N. Y.), 95, overruling 4 Barb., 192; *Forrest v. Forrest*, 6 Duer (N. Y. Super. C.), 102. In case of divorce on the ground of the adultery of the husband, or of his confinement at hard labor, the wife shall be entitled to dower as if he were dead; but in no other case of divorce from the bond of matrimony. General Statutes of Massachusetts, 1860, p. 535, sec. 38; Minnesota Statutes, 1849-1858, p. 466, sec. 24. In Missouri, the wife, if the faulty party, in divorce for adultery, will be barred of her dower, otherwise not. R. S., 1854, ch. 54, p. 431.

(1) Roll. Abr., 680.

(2) *Sidney v. Sidney*, 3 P. Wms., 269; *Blount v. Winter*, 3 Plowd., 277, note *Seagrave v. Seagrave*, 13 Ves., 443; *Buchanan v. Buchanan*, 1 Ball. & Beat., 246. In New York and Virginia, by legislative enactments, jointure is forfeited in the same manner as dower, and consequently this right is taken away by adultery. : N. Y. Rev. Stat., 742; Virg. Act, 1792.

the wife from taking dower in the husband's estate. (1) A jointure must consist of real property, that is to say, it must be a fee simple, fee tail, or an estate for the life of the wife in lands. If an estate be given to the wife for the life of another, or the lives of ever so many persons, it is no jointure, for it must be for her life. If it be given for a term of years ever so long, say one hundred, it is not a * jointure to bar her of her dower. [*42] A term of years, in the view of the law, is a less estate than an estate for life. It is a chattel only; while an estate for life is a freehold estate. (2)

Dower must be so created that the wife shall be entitled to the enjoyment of it immediately on the death of the husband, and it must be a competent settlement; it must be a conveyance to her, and not to a trustee. But a different rule prevails in chancery. A trust has there been holden a bar of dower, when settled as a jointure. So, too, an agreement to settle lands, as a jointure, has in chancery been holden a bar of dower. That a trust estate should, if settled in the wife, be a bar of dower, is directly opposed to the rule of law, and furnishes an instance where chancery, without the aid of the legislature, makes law. That an agreement to settle a jointure, where the jointure is specified in the agreement, should be a bar of dower, proceeds on the well-known maxim of equity, that what is agreed to be done is considered as done; and chancery will compel a specific performance of such agreement. 3 Bro. Parl. Ca., 492. (3)

If the widow reject her jointure, on the ground that it is not competent, this question must be determined by a court.

Whether a jointure depends for its validity on the contract of the wife, has been a litigated question. If it does, it is observa-

(1) 2 Bl. Com., 137; *Moore v. Grise*, 1 Ch. Cas., 125; Co. Litt., 36, b; 4 Kent's Com., 54. So a legal jointure, settled upon an infant, before marriage, is a legal bar of her dower. *McCartee v. Teller*, 2 Paige, 511; 4 Kent's Com., 54.

(2) Co. Litt., 36, b; 4 Coke, 2, b. But if an estate be limited to the wife upon condition, her acceptance of such conditional jointure makes it good. *Bac. Abr.*, tit. Jointure, G.

(3) *Vernon's case*, 4 Coke, 1. By the usage and law of Pennsylvania, a woman is entitled to dower in a trust estate. *Shoemaker v. Walker*, 2 Serg. & Rawls, 556. The strict construction given to the English statute at law has been greatly extended

ble that, although the wife is, at the time of the contract, *sui juris*, under no actual or presumed coercion of the husband, yet she shall not be holden to her contract if she have made an improvident bargain, when under the influence of that unbounded confidence which a female is disposed to place in the honorable intentions of her suitor. (1)

It has been a question, much agitated in the English courts, whether a jointure, settled on an infant wife, before marriage, was a bar of dower. This was never settled, * until the [48] case of the Earl of Bucks *v.* Drury, 3 Bro. Parl. Ca., where it was determined to be a bar of dower. The judges who denied that it was a bar went upon the ground that the wife, being a minor, was not *sui juris*, and could not be bound by her contract. Those who decided that it was a bar proceeded on the ground that a jointure was not a contract for a provision for the wife, but was a provision by the husband for the wife which he had a right to make; that, when made, if it was a competent livelihood, it would bar the wife of her dower; and that no consequences could be drawn from the privilege of the infant wife to avoid her contract; for the law was the same whether the wife was an adult or infant. In neither case would a jointure bar the wife of her dower, if it was not a competent livelihood; and in both it would bar her, if it was a competent livelihood. This much litigated question was determined in the House of Lords, when GOULD, PARKER, and PRATT delivered their opinions that she was not barred, viewing a jointure as a contract, and her as being a minor, not bound by her contracts; whilst Lord HARDWICKE, Lord MANSFIELD, WILMOT, BATHURST, ADAMS and SMYTH delivered their opinions that she was barred, because,

in chancery, and it has been often held, that, though a conveyance to trustees for the benefit of the wife was not a jointure, still such a settlement would be considered in equity a bar of dower. *Harvey v. Harvey*, 1 Atk., 563; *Jordan v. Savage*, Bac. Abr., tit. Jointure; *Charles v. Andrews*, 9 Mod., 152; *Williams v. Chitty*, 3 Ves., 545. So infants may be barred by an equitable jointure, provided it be not precarious, but be as certain a provision as is required to operate as a legal bar. *Carruthers v. Carruthers*, 4 Bro. Ch. Rep., 500; *Smith v. Smith*, 5 Ves., 189; *Simpson v. Gutteridge*, 1 Madd., 609; *Corbet v. Corbet*, 1 Sim. & Stu., 612.

(1) *Perkins v. Thornton*, Ambler, 503; *Seys v. Price*, 9 Mod., 219; Co. Litt., 36.

as Lord MANSFIELD declared, a jointure was *ex provisione hominis*, and not *ex contractu*. (1)

Admitting that the consent of the wife was necessary to render a jointure valid, might it not be successfully argued, that, since a minor wife is competent, at least with consent of parents and guardians, to contract marriage, which is the principal contract, she might contract respecting a jointure, which was only ancillary to the contract? If she were under certain circumstances *sui juris*, to enter into the principal contract, it seems reasonable that she should have power to enter into all contracts incidental to that which was principal. If she has arrived at those years of discretion when she is competent to *make [44] a valid contract to marry, why should she then not be able to contract for the incidents of marriage; if the incidents be pro-

(1) The case of the Earl of Bucks *v.* Drury, 3 Bro. P. C., cited in the text, as reported by Brown, contained merely a statement of the case, the arguments of counsel and the reversal of the decree.

In the notes of the judgments and opinions of Chief Justice WILMOT, published nearly forty years after the decision, his very elaborate and able opinion in the case will be found reported at length. WILMOT's Opinions, 177. He examined this question at great length and with much ability, and seems to have exhausted the whole store of ancient learning in relation to the rights and liabilities of infants, and concurred in the opinion of the majority of the common-law judges that the infant was barred. Lord HARDWICK, also, as appears from 2 Eden's Rep., 60, delivered a very able opinion in the case, concurring with a majority of the judges in the House of Lords. In *McCartee v. Teller*, 2 Paige, 511, the same question underwent a serious discussion before Chancellor WALWORTH, who, after a careful investigation of all the authorities, came to the conclusion that such jointure, settled upon an infant, was a bar of her right of dower. This decision was afterwards affirmed on appeal to the Court of Errors. 8 Wend., 267. Accompanying the report of this case in Wendell, is a report of the case of *Drury v. Drury* (cited in the text as *Bucks v. Drury*), with the opinion of Chief Justice WILMOT at length. In *Carruthers v. Carruthers*, 4 Br. Ch. Rep., 500; *Smith v. Smith*, 5 Ves., 189; *Simpson v. Simpson*, 1 Madd., 609; and *Corbet v. Corbet*, 1 Sim. & Stu., 612; the same doctrine is held. In Ohio, the more just rule is adopted, that if the jointure was made when the wife was an infant, or after marriage, she may, after her husband's death, waive her jointure and demand her dower. Stat. Ohio, 1824.

An equitable jointure, or a competent and certain provision for the wife, in lieu of dower, if assented to by the parent or guardian of the infant, before marriage, will, in analogy to the statute, constitute an equitable bar. *Corbet v. Corbet*, *McCartee v. Teller*, *et supra*.

per and necessary to be provided? To say that she shall not contract for these, is the same thing as to say that she shall not marry. There is something incongruous in the idea that she shall have power to contract to marry, and yet have no power to make other contracts incident to the principal contract. If a jointure depends on a contract, there is no hazard; for unless a competent livelihood be provided by it, it will not bind the wife in any case, not even if she were an adult. From the late decisions respecting jointures, the point of light in which this subject is now to be considered, is this: that a jointure is not in the nature of a contract between the parties; but is a provision by the husband for the wife. When such a provision is made as the law requires, it is a bar of dower. So that no argument arises against an infant's being barred on account of any incapacity to contract. It must be declared in the instrument, that the jointure is in lieu of dower, otherwise it will not bar the widow of her dower. It will be considered as a marriage settlement on the wife, without any intention between the parties, of barring her dower. Although it is no bar of dower, such settlement may have the effect of entitling the husband and his executors to the choses of the wife that remain uncollected on the dissolution of the coverture. (1)

When a jointure is settled on a wife, and there proves to be a deficiency, by reason of want of title, to part, or from other causes, the wife has a lien on the other lands of the husband; and, if the jointure were settled, by the father of her husband being a party to the settlement, she has also a lien on his lands. (2) Sometimes lands are settled as a jointure: in the settlement there is a covenant by the husband that the lands shall be of a certain value. (a) If, after the death of the husband, the yearly value fall short* of the covenanted value, the jointress is entitled to [*45] have the deficiency made up out of other lands belonging

(a) 1 Atk., 440.

(1) Bac. Abr., tit. Jointure; 4 Kent Com., 54.

(2) So by statute of 27 Henry VIII, if she is evicted by law from her jointure, or any part of it, the deficiency was to be supplied from other lands, whereof she would have been otherwise dowable.

to the husband; or, she may come in as a specialty creditor upon the husband's estate. 2 Eq. Ca. Abr., 241; 4 Bro. Par. Ca., 604 and 588. And such jointress may commit waste so far as to make up the deficiency of the jointure.

Although a femme covert is bound by her fine of her land; yet, if after marriage the husband settles a jointure, and she levy a fine of this, with her husband; this is no bar of her dower. (1) (a)

A jointure is sometimes settled upon a wife after marriage, in performance of articles of agreement entered into before marriage. If a jointure be settled upon the wife after marriage, without such previous articles, it can have no effect to bar her of her dower, unless she elects to have it so, after the death of her husband. Being, at the time of the settlement of the jointure as it is said, under the presumed coercion of her husband, she is not bound by the contract but may resort to her dower. If she elect to take the jointure after the death of the husband, she shall then be barred of her dower; for she cannot have both. (2)

(a) Dyer, 338.

(1) Co. Litt., 26. But if a femme covert joins with her husband in levying a fine to raise a sum of money by way of mortgage, this shall bind her; but in this case there results a trust to the wife to reinstate herself in her jointure by redeeming. 2 Ch. Cas., 162. And the money to redeem shall be paid out of the personal estate of the husband. 1 Vern., 41, 191, 213; 2 Ibid., 4, 36.

(2) This is one provision of the statute of 27 Henry VIII, and has probably been adopted in all the states, where the law of jointure in bar of dower has been introduced. In Vermont, by the Revised Statutes of 1839, the widow may make her election within eight months after the will of the husband shall have been proved, or after letters of administration shall have been granted on his estate, to receive the jointure or pecuniary provision in lieu of dower, or to waive it, and have her dower set out; and this, whether the jointure or provision was settled before or after marriage. Revised Statutes, 1839, 290.

In Massachusetts, the statute of 27 Henry VIII, has always been in force upon this point. *Hastings v. Dickinson*, 7 Mass. Rep., 173. And the same provision is introduced into the Mass. Rev. Stat. of 1835. In New York, it was re-enacted in 1787. In Connecticut, the law is nearly the same, though in that state a jointure may as well consist of personal as real property. 1 Swift's Dig., 86; Rev. Stat. Conn., 1821. In Virginia, if the widow is evicted of her jointure, she may still enforce her right of dower. *Ambler v. Weston*, 4 Hen. & Munf., 23. And the same provisions exist in Pennsylvania, South Carolina and Ohio. 2 Consist. Rep. by Treadway, 747; 1 Dallas Rep., 417; Griffith's Register, Stat. of Ohio in 1824. In Pennsylvania, it may be considered doubtful whether a settlement of personal estate would be held

When a jointure is settled on a wife before marriage, and the wife agrees to join with her husband in levying a fine, which makes a valid sale, she is barred of both jointure and dower. A jointure cannot be affected by the alienations of the husband, any more than dower. She may, as stated, bar herself of her jointure, by joining with her husband in levying a fine; and in this country, where the mode of assurance by fine is not practised, I presume, by the ordinary modes of conveyance. In the city of London there is a custom, by the force of which, this is done by deed of bargain and sale. (1) The law on this subject is this: If a wife joins with her husband in the levy of a fine of her jointure, if that jointure were *made before marriage, [46] she cannot resort to her dower, for that was barred by the jointure. If the jointure were made after marriage, she may have dower; for, in that case, if she had not levied a fine, on the death of her husband she might have resorted to her dower, and have rejected her jointure. Co. Litt., 37; 1 Dy., 358. It would seem as if this rule were established, when it was understood that the consent of the wife was absolutely necessary to give validity to the jointure. If the validity of the jointure depended solely *ex provisione hominis*, and not *ex contractu*, why would not a competent jointure have the same effect after marriage as before? Why should it make any difference that she was *sui juris* before marriage, and not so afterwards, if being *sui juris* would have no effect on the jointure? I believe that whoever will take the trouble to examine all the decisions on this subject will be satisfied that the consent of the wife was originally necessary to give binding force to a jointure. Therefore it is, if made after marriage, when her consent is of no avail, she should not be pre-

a jointure sufficient to bar dower; but the doctrine of the case of *Drury v. Drury*, that an infant's dower may be barred by jointure, is considered as settled law. *Shaw v. Boyd*, 5 Serg. & Rawls, 309. Though a naked contract by an infant, in expectation of marriage, with the consent of her parent or guardian, is not sufficient to bind her real estate, except perhaps in favor of the issue where they are purchasers S. C. The provisions of the English Statute have, doubtless, been incorporated into all the states, where the common law is recognized as binding authority

(1) Bac. Abr., tit. Jointure.

vented from claiming her dower; unless she has, since she has been discovert, validated the jointure by her election to take it.

Upon the husband's giving a bond to a trustee for the wife, that he will settle certain other lands on her, and he does not, the wife, as to this bond, shall be preferred to all other creditors.

If a man make a voluntary settlement of certain lands upon his daughter as her portion, and then marry a second wife, and settle the same lands upon the wife as a jointure, who has no notice of the settlement on the daughter, the wife shall hold the lands; and if the husband devise other lands in his will to his wife, in lieu of the jointure lands, and she refuse to accept them, the daughter shall have the land so devised. (a)

*The reason why the elder daughter's title gives way [*47] to the wife's title is, that a jointress is considered as a purchaser for a valuable consideration, and will be enforced in chancery. (1) (b)

It seems that, anciently, there was a method of endowing a wife, *ad ostium ecclesie*, of personal property as well as real; which property was her own; over which the husband had no more control than he has in modern times over the property which is given to her sole and separate use. This has become obsolete; for the wife was not bound by it; of course it fell into disuse. (2)

(a) 1 Ves., 219; 1 Eq. Ca. Ab., 221.

(b) 1 Cha. Ca., 178; 10 Ibid., 409.

(1) Douglas v. Ward, 1 Ch. Ca., 100.

(2) In relation to this species of dower, Judge KENT (4 Caines' Cas., 86) observes: We find the law of dower, in the mode of endowing *ad ostium ecclesie*, in common use in the time of Glanville, but limited to the third part of the freehold lands, which the husband held at the time of the marriage. This limitation is likewise mentioned in Bracton & Fleta. The definition of this species of dower, in Bacon's Abridgement, is, where a man of full age, seised of lands in fee, after marriage endows his wife at the church-door, of a moiety or a third part of his lands, describing them with certainty. In which case, after the husband's death, the wife may enter upon the lands without any other assignment, because the solemn assignment at the church-door is equivalent to an assignment *in pais* by metes and bounds; but this assignment cannot be made before marriage, because then she is not entitled to dower. Bac. Abr., tit. Dower, *ad ost. eccl.* It is believed that this method of endowing a wife has never been in use in the United States.

If a man, by will, give property to his wife in lieu of dower, she is at liberty to take or refuse it. If she take it, she is barred of her dower. If she do not take it, she may resort to her dower. (a) Such legacy ought to be expressed in the will, to be in lieu of a dower; or, generally, it will have no such effect; but the widow will be entitled to both her dower and legacy. (1) (b)

(a) Eq. Ca. Abr., 318.

(b) 3 Ves., 365; 3 Atk., 490; 4 Co., 4; Co. Litt., 38.

(1) It is a well-established principle, that the acceptance by a widow of an estate given to her by the will of her husband, in lieu of dower, is a bar, at law as well as in equity, to her right of dower in other lands whereof the husband died seised. *Wake v. Wake*, 1 Ves., 335; *Edwards v. Morgan*, 13 Price Exch. Rep., 782; *Kennedy v. Mills*, 13 Wend., 553; *Jackson v. Charchill*, 7 Cow., 287; *Van Orden v. Van Orden*, 10 John. Rep., 30; *Hoyle v. Stewart*, 8 Ibid., 104; *Kennedy v. Nedrow*, 2 Dallas Rep., 418; *Hamilton v. Buckwalter*, 2 Yeates, 389; *McCullough v. Allen*, 3 Ibid., 10; *Oreacraft v. Wions*, Add., 351; *Evans v. Webb*, 1 Yeates, 424; *Kennedy v. Wistar*, cited 1 Dallas, 418; *Duncan v. Duncan*, 2 Yeates, 302; *Wilson v. Hamilton*, 9 Serg. & Rawle, 424; *Lalnaweaver v. Stoeover*, 1 Watts & Serg., 160; *Shatwell v. Sedam's heirs*, 3 Ohio Rep., 5. But the implication ought strongly to appear from the will, that it was the husband's intention that she should not have both the testamentary provision and her dower. *Kennedy v. Nedrow*, *Hamilton v. Buckwalter*, *McCullough v. Allen*, *Jackson v. Churchill*, *supra*.

In Mississippi, every devise to the wife of the testator, unless otherwise expressed, is to be construed in lieu of dower. Rev. Code of Laws of Miss., p. 468, art. 168. In Missouri, a devise of real estate will be held in lieu of dower, unless otherwise expressed in the will. R. S., 1845, p. 431, sec. 10. A devise of real estate, in New Jersey, is made a bar of dower, unless dissented from within six months. *Thompson v. Egbert*, 2 Harrison, 460. So any provision, in Massachusetts, Ohio, and Alabama, is a bar of dower unless dissented from within six months after probate, or unless the will show plainly that it was the intention of the testator that she should have both. *Crane v. Crane*, 17 Pick., 422; *Allen v. Pray*, 3 Fairfield, 138; *Stille v. Folger*, 14 Ohio, 610; *Hilliard v. Binfield*, 10 Ala., 977. So, also, in North Carolina and Tennessee, any provision is a bar unless within a certain time the widow dissents from the will. *Reid v. Campbell*, Meigs, 378; *McDaniel v. Douglas*, 6 Humph., 220. In Pennsylvania, any devise or bequest will be deemed in lieu of dower unless otherwise declared, with an election to the widow. Act of 1833, sec. 11. In New York, the widow is entitled to dower, unless the provision be expressly made in lieu of dower, or be so repugnant to the other provisions of the will that they cannot stand together. *Sandford v. Jackson*, 10 Paige, 266; *Lewis v. Smith*, 9 N. Y. (5 Seld.), 502; *Lasher v. Lasher*, 13 Barb., 106; and where there is a provision in lieu of dower, the widow has one year in which to elect. 3 R. S., 5th ed., p. 32. And the fact that specific provisions, made for her by the will, exceed the value of her dower right, is no reason for implying that the testator intended to bar her dower

The husband in his will, gives a legacy to his wife, on condition that she releases her dower: if the wife elect to take her legacy, and there is a deficiency of assets to pay all the legacies, her legacy shall not abate. (1) (a)

In several, if not in all the states, a practice has obtained with very many men, to give in their wills, to their wives, one-third
(a) 1 P. W., 127.

in the residue. *Mills v. Mills*, 28 Barb., 454. The provisions of the acts of 1848-1849, respecting the property of married women, allowing them to convey as if unmarried, does not authorize a conveyance by the wife of all her dower right in his real estate to her husband for a nominal consideration. The act is to be construed as giving a right to convey to other persons than her husband. *Graham v. Van Wyck*, 14 Barb., 531. In Massachusetts, when a man dies seised of lands, not having lawfully devised the same, and leaving a widow but no issue, the widow is entitled to *one-half* of said estate during her natural life in lieu of dower. General Statutes of Massachusetts, 1860, ch. 90, sec. 15.

In North Carolina, it was held, that a widow must dissent from her husband's will in person, and could not do so by attorney or guardian, and if she were a lunatic no objection could be made. *Lewis v. Lewis*, 7 Ired., 72; *Hinton v. Hinton*, 6 Ibid., 274. Held, also, in *Welch v. Anderson*, 28 Miss. (7 Jones), 293, that the election of the widow was a personal right, and not transmissible by descent. A husband, by will, made certain provisions for his wife "in lieu of dower," and afterwards acquired other real estate: held, that she, having accepted the provision, was barred as to the after acquired estate. *Chapin v. Hill*, 1 R. I., 446.

The intention of the testator, as gathered from the whole instrument, governs as to the question whether a legacy to the wife is in lieu of dower. If it is apparent that, to allow the widow dower and the legacy in addition thereto, would defeat or materially lessen the allotments to all or any of the devisees or legatees, the court would require the widow to elect. *Dodge v. Dodge*, 31 Barb., 413. See *White v. White*, for a case where she was compelled to elect on the grounds above laid down. 1 Harrison, 202. A devise of all the testator's property, real or personal, during widowhood, or during widowhood and the minority of children, and *then* to be divided among the children, held not to be a devise in lieu of dower, so as to put the widow to her election. *Sandford v. Jackson*, 10 Paige, 266; *Church v. Bull*, 2 Denio, 430.

By the statutes of Minnesota, if any lands are devised to a woman, or other provision made for her in the will of her husband, she must make her election, and shall not have both unless it clearly appear in the will to be the intention of the testator. Stat. of Minn., ch. 36, p. 409, sec. 18.

(1) This is said to be upon the ground that a devise implies a consideration, *Morgan v. Edwards*, 1 Dow. & Clark, 104; *Smith v. Kiniskern*, 4 John. Ch. Rep. 9; *Adsit v. Adsit*, 2 John. Ch. Rep., 448; *Wood v. Lee*, 5 Monr., 58; *Bailey v. Duncan's representatives*, 4 Monr., 265. But where it is expressed in the will, that

part of their real estate, for the life of the wife; without mentioning that it is given in lieu of dower. And yet, nothing is further from their thoughts, than that the wife should have one-third of the real property under the will, and her dower also in the whole estate. What construction would be given by the courts of our country, may, perhaps, be uncertain.

The practice in the courts of probate in Connecticut, is to set off to the widow, only one-third part of the real estate of the husband, for her life. It will be difficult to reconcile this with [*48] the ancient rules of law; but doubtless *it comports with the intention of the devisor; and, in most cases, is in accordance with the more modern decisions. All the cases, down to a very late period, have proceeded upon the ground, that a devise cannot be averred to be in satisfaction of dower, unless it be so expressed in the will; and that no averment of intention was admissible, except what could be collected from the words of the will. For all wills of land must be in writing; and when the devise was expressed to be in lieu of dower, if the widow took the legacy, she was barred of her dower; but she was at liberty to elect her dower. If she chose one, she could not take the other. Even if it was personal estate, which was given in lieu of dower, if she elected to take it, it would be a bar to her taking her dower. (1)

the provision is in lieu of dower, the wife must elect. *Axtel v. Axtel*, 2 Ch. Cas., 24; *Lawrence v. Lawrence*, 2 Vern., 365; S. O., reported in 1 Eq. Cas. Abr., 218; 2 Freem. Rep., 234; 1 Br. P. O., 59; *Hitchin v. Hitchin*, Prin. Ch., 133; *Galtor v. Hancock*, 2 Atk., 427; *Tinney v. Tinney*, 3 Atk., 8; *Inledon v. Northcote*, Ibid., 436; *Ayres v. Willis*, 1 Ves., 230; *Charles v. Andrews*, 9 Mod., 152; *Broughton v. Erington*, 7 Bro. P. O., 12; *Herbert v. Wren*, 7 Cranch, 370; *Blunt v. Lee*, 5 Call, 481; *Roberts v. Smith*, 1 Sim. & Stur., 513; *Dickson v. Robinson*, Jacob, 503; *Rowley v. Dickson*, 3 Russ., 192.

Where there is a legacy in lieu of dower, the legatee is not compellable to contribute with the other legacies to the payment of debts due from the estate. *Lord v. Lord*, 23 Conn., 327. And when a legacy is in lieu of dower, the legatee is treated as a purchaser, and entitled to all the incidents resulting from that relation. *Tift v. Porter*, 8 N. Y., 522. Held, in *Mitchell v. Blain*, that a legacy in lieu of dower must contribute with all other legacies, to make up the share of a post testamentary child, not provided for in the will. 5 Paige Ch., 588.

(1) Vide note, page 47. (Marg.)

The law here laid down, seemed to be very strongly established, by the following authorities. Co. Litt., 86; 3 Bro. in Chan., 255; 1 Dyer, 220; Cro. Eliz., 128; Finch, 184; Lord Raym., 485; 8 Bro. in Chan., 483. But the modern authorities have deviated from the rule here laid down. It is a governing principle in the modern cases, that the widow shall not have both dower and legacy, although the will is silent on the subject; provided, the taking both would be inconsistent with the other dispositions of the will. If it appear that other legatees will be defeated of their legacies, if she take both; or, if it appear that the allowance of both will break in upon the provisions of the will, so that the intention of the testator will be thwarted, if she take both: in such case, she can take only one, and must make her election. If A should make a will, and devise one-third of his real estate to his wife B, for life, and the other two-thirds to his children C and D; and also after the death of the wife, the one-third before given to his wife to be divided equally between them; in this case the devise to B is *not said to be in lieu of dower. According to the earlier rule on this sub- [*49] ject, as the devise is not said to be in satisfaction of her dower, she will take both. For you cannot aver his intention, and collect it from the dispositions of the will; but it must be expressed in the will, to be in lieu of dower. By the modern cases, she would not take both her dower and the legacy, for this would break in upon the dispositions of the will. Nothing is more apparent, than that the testator intended that C and D should take, each one-third of his real estate. But this could not be, if B the wife took under the will one-third, and also one-third as dower. From the whole we may conclude, that the intention of the testator, is the pole-star in these cases, as in all others which arise under wills; and, that this intention may be collected, from the dispositions of the estate in the will. (1)

(1) *Arnold v. Kemstead*, Ambl., 466; *Vellareal v. Lord Galway*, Ambl., 482; *Jones v. Collier*, Ambl., 730; *Wake v. Wake*, 3 Br. Ch. Rep., 255; *Boyn-ton v. Boyn-ton*, 1 Br. Ch. Rep., 445. It is somewhat difficult to determine whether it must not appear from the terms of the will that the testator intended the devise to be in lieu of dower. But this is at least certain, that the implication that she shall not have

How would it be, if some fact *dehors* the will existed, which would show that the intention was different from what it appeared to be on the face of the will? Could not the proof of such fact be admitted, to cast light on the subject? The ground taken in the earlier cases, was this: that the statute of frauds, required that all devises, legacies, &c., should be in writing. It would follow, of course, that the proof if ever so clear an intention to give in lieu of dower, would answer no purpose. For it would be an idle intention, unless expressed in writing. But the construction now given to that statute, goes very wide of this; and you can now prove the existence of a contract, by proof of a variety of facts, the existence of which facts cannot be accounted for on any other hypothesis, but only the existence of a certain contract. This may be thus exemplified. A conveys Whiteacre to B, by an absolute deed; and by A, it was claimed, that the conveyance was a mortgage, as security for a note which B [*50] held against him, of not more than a tenth part *of the value of Whiteacre. A offers to prove this fact by C and D, who heard the contract when the deed was given. But C and D are not admissible witnesses, to the terms of a contract respecting the title of land. The law deems it dangerous to trust the memory of witnesses, to the precise terms of a contract. But if A can prove the existence of certain facts, where there is no such danger of mistake, which speaks an unequivocal language, and which could not possibly exist, unless this conveyance was such a one as A claims it to be; this he may do. He accordingly proves the notorious fact, that he, A, has been ten years in possession of that land since the giving of the deed, and has never been called upon to pay a cent for rent. This excites a strong

both the devise and dower, must be strong and necessary before the widow will be put to her election. *Foster v. Cook*, 3 Br. Ch. Rep., 347; *French v. Davis*, 2 Ves., Jr., 572; *Kennedy v. Nedrow*, 2 Dallas, 418; *Creacraft v. Wions Add.*, 354; *Hamilton v. Backwalter*, 2 Yeates, 389; *McCulloch v. Allen*, 3 Yeates, 10. And the widow shall not in any case be forced to make her election, until an account is taken and it is ascertained out of what estate she is dowable. *Hall v. Hall*, 2 M'Cord, Ch. Rep., 280; *Boynton v. Boynton*, 1 Br. Ch. Rep., 445. For a full and accurate exposition of the law on this subject, see *Birmingham v. Kirwain*, 1 Scho. & Lef., by Lord READINGSdale; *Chalmers v. Storil*, 2 Ves. & Beames, 222.

suspicion that it was a mortgage. It is just as mortgagor and mortgagee always conduct, and contrary to all experience that B, the absolute proprietor of this land, should suffer A to take the profits of the land, and never pay, or secure to be paid, any rent. To render the case more clear, A proves that, ever since he gave the deed, B has called upon him annually for the interest of the note, which he has always paid. Not a doubt now remains; for certain it is, if the deed was given for the debt contained in the note, the note was paid; and nothing could be more absurd than that B should call for interest on the note, and that A should pay it. But it is exactly as it would be if it was a mortgage to secure the debt. B would then hold the note, collect his interest, and leave A in possession. On these facts a court in chancery would treat B as a trustee. Though all this proves that this was a mortgage, yet it does not prove, what the statute seems to require, that it was in writing. Neither have courts required that this should be proved. If they can arrive at the truth of the existence of a contract, without depending on the witnesses for the proof of the terms of the contract, [*51] they * have treated such contract as valid. Hence it is, if a defendant, by his answer, admits that such a contract exists, though it is one that the law requires should be in writing to be valid, yet, as the proof of the existence of such a contract comes from a source where there is no danger of mistake, the court treats it as valid. I should, therefore, suppose that any fact which would show the intention of the testator, though *dehors* the will, might be proved, provided it stood well with the will. (1)

(1) This position seems to be confirmed, in effect, by several authorities. In *Druce v. Dennison*, 6 Ves., 385, parol evidence was admitted to show that, under the words, "his personal estate," the testator designed to include certain chattels belonging to his wife, and not reduced into possession in his lifetime. The case of *Pulteney v. Darlington*, 1 Bro. Ch. Rep., 117, was decided before. It was there held that parol evidence was admissible to show the intention of the testator at and before the making of the will. Afterwards, in *Pole v. Lord Somers*, 6 Ves., 309, the same question was presented, but its decision upon the broad ground assumed in *Pulteney v. Darlington* studiously avoided. In *Druce v. Dennison*, the Chancellor observed that, though there was much in the will itself which would go far towards establishing the construction he was prepared to give it, yet he chose to

It has been a question, whether a devise by a husband may not operate as a bar of jointure. But it now seems to be settled that it will not, either as it respects a jointure made before or after marriage, unless it appears plainly from the will that it was intended as a satisfaction. In that case, if the wife accepts the devise, she waives her jointure. 4 Bro. Parl. Ca., 503; 2 P. W., 618.

If a jointure be settled on a wife for life, and a covenant entered into that the yearly value shall be of such a sum; if it falls short, she may commit as much waste as to make it of that value. *Carew v. Carew*, Mich., 1678. Or she may apply to chancery, and have a decree for the deficiency. For such covenant is not voluntary, and may be enforced in chancery. (1)

It was determined, in 3 Atk., 8, that a general provision of a wife was no bar of dower. But it appears from that report that Chancellor KING had determined that a bond given in trust, to secure a sum of money for the wife's livelihood and maintenance, would be a bar. Such an opinion well accords with the latest decisions. But I presume, at that time, nothing more was meant than this: if the wife elected to have the bond, that it should be

ground his opinion as to the admissibility of the evidence in question upon the authority of the decision in *Pulteney v. Darlington*, which, being a case in which the will itself presented no ambiguity, and involved in which was property to an immense amount, to answer the words of the will, afforded an unmixed precedent for the reception of this collateral testimony, in manifestation of a testator's intention as to the import and extent of a particular descriptive phrase; in a case, too, where the application of the description to the property in question would affect the quality of the estate and determine the rights and obligations of the parties claiming under the testator. In the older cases, the disposition to reject evidence of the testator's intention, foreign to the will, is much more emphatically expressed than in the modern ones. *Nourse v. Finch*, 1 Ves., Jr., 359; *Ibid.*, 324; *Dake v. Duchess of Rutland*, 2 P. Wms., 215, *contra* to the cases above cited. But, notwithstanding these decisions to the contrary, the better opinion seems to be that evidence, extraneous to the will, is admissible, in general, to show the intention of the testator. I have, however, been able to find no late cases bearing directly upon the point in controversy; i. e., whether the testator's intention that a legacy to the wife should be in lieu of dower is provable, when not so stated in the will.

(1) So she may come in as a specialty creditor upon the husband's estate for the deficiency, with interest. *Parker v. Harvey*, 4 Bro. P. C., 604; see also *Grove v. Uook*, *Ibid.*, 593; *Eustace v. Keightly*, *Ibid.*, 588.

in bar of dower. For I believe it was not at that time recognized as a sound doctrine, that the husband had it in his power, whether the wife was willing * or not, to bar her of her dower, by any provision that he should make for her after marriage. (1) [*52]

There is a case in year-book of Edward III, 65, where a husband conveyed away his land in fee, reserving a hundred marks yearly rent to himself and wife for twenty years, and died: after his death the wife accepted the yearly rent; but this was holden to be no bar of her dower in said land.

We have already observed, that a wife cannot be barred of her dower by the conveyance of the estate by the husband, unless she consents to it. So, too, if she do not join with her husband in a mortgage of his estate, his mortgaging it in no measure affects her rights of dower. If she do join with him, she has a right to redeem the mortgaged premises by paying the debt for which they are mortgaged. (a) (2) So, too, if her husband's estate were mortgaged when she married, she shall have a right to redeem. In both cases, one-third of the sum paid it is her duty to pay: the other two-thirds it is the duty of the heir or devisee, as the

(a) Pre. in Chan., 137.

(1) Upon general principles, it would seem that there is a right of the wife in the estate of her husband that cannot be barred by any testamentary or other provision without her consent. In Vermont, by statute of 1839, any pecuniary provision in lieu of dower will bar her of her right unless she elects to waive it and have her dower set off. Rev. Stat., Vt., 289. And the same statute provisions exist in New York, Virginia, Massachusetts and Illinois. (See note, p. 47, marginal.)

(2) If she join with her husband in a conveyance of his estate, her dower will be barred. *Powel on Mort.*, 673; *Catlin v. Ware*, 9 Mass. Rep., 218; *Lafkin v. Curtis*, 13 Ibid., 223; *Powell v. M. & B. M. Co.*, 3 Mason's Rep., 347; *Kirk v. Dean*, 2 Binn., 341; *McIntyre v. Ward*, 5 Ibid., 301; *Shaller v. Brand*, 6 Ibid., 435; *Barnet v. Barnet*, 15 Serg. & Rawls, 71; *Brown v. Farrar*, 3 Ohio Rep., 140; *Glenn v. Bank U. S.*, 8 Ibid., 72; *St. Clair v. Morris*, 9 Ibid., 15.

But where the acknowledgment of the deed is defective, it will not bar her dower. *Watson v. Bailey*, 1 Binn., 470; *James v. Lyon*, 3 Yeates, 471; *Evans v. The Commonwealth*, 4 Serg. & Rawls, 49; *Fowler v. McClary*, 6 Ibid., 143; *Jourdan v. Jourdan*, 9 Ibid., 273; *Maddock v. Williams*, 12 Ohio Rep., 377; *McFarland v. Febiger's heirs*, 8 Ibid., 194; *Walah v. Kelly*, 34 Penn., 84; *Manning v. Laboree*, 33 Me., 243; *Dalton v. Murphy*, 30 Miss., 59; *O'Farrell v. Simplot*, 4 Iowa, 381; *Dewey v. Campan*, 4 Mich., 565.

case may be, to pay. The wife who redeems, and her executor, shall hold the premises against the heir or devisee, until they pay to her two-thirds of the mortgage-money. They need not, however, pay interest, as she has the usufruct in the meantime. (1)

By the common law, when a husband was attainted of felony, his wife could not be endowed. (2) By 1st Edward VI she is, in that case, entitled to dower; but attainder of treason bars her of dower. (3)

If lands settled as a jointure are mortgaged, the wife may abandon them, and resort to her dower; or she may redeem them, and her executor shall hold them against the heir, until the whole mortgage-money is paid, with interest; for a jointress has a right to hold the land discharged from all incumbrances. (4)

* If a husband make a lease of certain lands for life, [*53] before marriage, and die, the wife cannot be endowed; for there was no seisin, in deed or in law, of the freehold; but if had been a lease for years, she would be entitled to dower in the reversion. (5) A wife cannot be endowed of an equity of redemption. 'This is a point which has been much agitated before the English courts. By Sir JOSEPH JEKYL, a very able lawyer and correct judge, it was determined that she should be endowed of an equity of redemption. (a) This decision has been since pronounced not to be law, being opposed to the course of decisions on the subject. (b) Some of their ablest judges and writers

(a) 1 Ch. Ca., 271; 1 Atk., 606.

(b) 2 P. W., 262.

(1) Powell on Mort., 681. And a dowress, like an heir or devisee, has a right to have the personal estate of the husband, as far as it will extend, applied in discharge of mortgages, and other debts contracted by the husband, which are charges on the land whereof she is endowable; and even where the personal estate is insufficient to discharge the debt, it seems that, in some cases, if not in all, she will be entitled to the privilege of having the lands which remain in the hands of the heir charged therewith, in exoneration of the lands assigned to her in dower. Powell on Mort., Rand's ed., F, 681.

(2) Plowd., 262; Coke Litt., 40, b; Brook., 81; Fitz. Nat. Brev., 150; Perkins, 308, 387.

(3) But by statute V Edw., 6, ch. 11, the statute I Edw. is repealed in cases of treason.

(4) Pow. on Mort., 681; Berton v. Stiles, 1 Ch. Ca., 271.

(5) D'Arcey v. Blake, 2 Scho. & Lef., 387

have, however, shown symptoms of disgust with the settled course of decisions. They have declared, that a strict adherence to some hasty adjudications on this subject has produced such a number of precedents in opposition to the claim of the wife as to render it difficult to alter the course which the business has taken; and that the maxim, *stare decisis*, had more weight than the reasonableness of the decisions. It is remarkable that the courts refuse to place the estate by curtesy on the same footing. They allow the husband to enjoy his curtesy in the equity of redemption which belonged to his wife in her lifetime, and has descended to her heirs. In Connecticut, it is decided by the Supreme Court that dower may be had of an equity of redemption. (1)

(1) *Chaplin v. Chaplin*, 3 P. Wms., 229; *Att'y Gen. v. Scott*, Sug. Law Vend., App., 46; *Goodwin v. Winsmore*, 2 Atk., 525; *Burgess v. Wheate*, 1 Black. Rep., 138; *Dixon v. Saville*, 1 Bro. Ch. Rep., 326; *Ford v. Wade*, 4 *Ibid.*, 526; *D'Arcey v. Blake*, 2 Scho. & Lef., 387.

The courts of law in New York have decided that a mortgagor, in possession of lands mortgaged, has, in regard to all the world but the mortgagee, the legal seisin, and that, in case of his death while in possession and before foreclosure, his widow is entitled to dower in the lands mortgaged, of which she cannot be deprived by a purchaser of the equity of redemption of her husband. *Waters v. Stewart*, 1 *Caines' Cases in Error*, 47; *Jackson v. Willard*, 4 John. Rep., 41; *Hitchcock v. Harrington*, 6 *Ibid.*, 290; *Collins v. Torrey*, 7 *Ibid.*, 278; *Coles v. Coles*, 15 *Ibid.*, 319. The court of equity likewise follows the same doctrine, and allows the widow her dower out of the proceeds of the sale of the mortgaged premises, on a bill for a foreclosure and sale. *Titus v. Nelson*, 5 John. Ch. Rep., 452.

The grantees of a mortgagor who has mortgaged the premises for the purchase-money, and sells portions of the mortgaged premises subject to the mortgage, are seized of the equity of redemption in the portions conveyed to them, and their wives are respectively entitled to dower out of the portions conveyed to their husbands, subject to the payment of the mortgage. *Mills v. Van Voorhies*, 23 Barb., 125. The widow of a mortgagor for the purchase-money has a right of dower in the equity of redemption, subject to the lien of the mortgage, but not paramount to it. S. C., 20 N. Y. 412.

A release by the husband of his equity of redemption in lands mortgaged, not executed by the wife, though she joined in the mortgage, is no bar to her dower in the remaining interest of the husband in the land after the satisfaction of the mortgage. *Swaine v. Perrine*, 5 John. Ch. Rep., 482. In Connecticut, it is held that the widow of a deceased mortgagee is entitled to dower in the equity of redemption. *Fish v. Fish*, 1 Conn., 557. Such, also, is the law of Pennsylvania. *Reed v. Morrison*, 12 Serg. & Rawle, 18. In South Carolina and Massachusetts the wife can-

The wife of the mortgagee, on the death of her husband, cannot be endowed in the mortgaged premises. Mortgages are considered as personal property for every purpose, only that the lands are subject to the mortgagee's legal title, so far as that legal title is of importance to him to avail himself of the possession of the lands that he may procure a satisfaction of his debt. (1)

The wife of a trustee cannot be endowed; but where a father [*54] purchased in the name of the son, and the son *executed a declaration of trust to the father, but went into possession, married a wife, and continued in possession until death, his wife shall be endowed, for the declaration of trust was fraudulent. (a) (2)

(a) 1 Eq. Ca. Abr., 212.

not have her dower in lands mortgaged for the purchase-money, until she has redeemed the mortgage. *Crafts v. Crafts*, 2 McCord's Ch. Rep., 54; *Bolton v. Ballard*, 13 Mass. Rep., 227. But in Massachusetts, if the husband, in his lifetime, or the wife or his representative, after his death, redeem, she will be entitled to dower. *Hildreth v. Jones*, 13 Mass., 525; *Gibson v. Crehore*, 5 Pick., 146. So if the husband purchase lands under a mortgage, and the grantor discharge the mortgage, the wife may have her dower. *Snow v. Stevens*, 15 Mass. Rep., 278. But she is not dowable of an equity purchased by the husband during coverture, unless he has obtained a discharge of the mortgage. *Bird v. Gardiner*, 10 Mass., 364. Nor of lands mortgaged by the husband before marriage and not redeemed. *Scott v. Hancock*, 13 Mass. Rep., 164. But she may redeem the mortgage, and will hold as assignee after the redemption, but will be bound to keep down one-third of the interest during her life. *Gibson v. Crehore*, *ut supra*. See, further, *Stow v. Tift*, 15 John. Rep., 458; and, *contra*, *Clairborne v. Henderson*, 3 Hen. & Munf., 322; *Heth v. Cocke*, 1 Rand., 344; *Van Dyne v. Thayre*, 19 Wend., 162; *Stille v. Carroll*, 12 Pet., 201.

(1) *Pow. on Mort.*, 703; *Bevant v. Pope*, 2 Freem., 71; *Hinton v. Hinton*, 2 Ves., 633.

(2) There are some old authorities which allow dower in trust estates, for which see *Pow. on Mort.*, 702, in note, and in Pennsylvania a widow may still have her dower of a trust. *Shoemaker v. Walker*, 2 Serg. & Rawle, 554; *Reed v. Morrison*, 12 Ibid., 18; and see cases first cited in note, page 125; *Powell v. The M. & M. Co.*, 3 Mason, 347; *Cowman v. Hall*, 3 Gill & John., 398.

In Maine, the wife is dowable of equity of redemption. *Manning v. Laboree*, 33, Maine, 343; *Simonton v. Gray*, 34 Ibid., 50. See also *Hinchman v. Stiles*, 1 Stock (N. J.), 361; *Hastings v. Stevens*, 9 Foster (N. H.), 564.

When a woman marries, after the execution of a mortgage on land by her husband, a court of chancery, whilst it makes the security available to the mortgagee, will take care that the interest of the widow is not affected more than is necessary

If a testator devise lands to pay his debts and legacies, and then to his son in fee, and the son die before debts and legacies are paid, yet his wife shall be endowed as soon as the debts, &c., are paid. The devise for the payment of debts, &c., is a mere chattel interest. The son, therefore, had a legal seisin of the estate from the death of the testator. Still, as the estate was disposed of for a particular purpose, no dower could be enjoyed by the wife until that particular purpose was answered.

If a husband sow the lands, and die before a severance, and the widow be endowed of that land, she, and not the executor, shall have the emblements. (1) If the lands had gone to the heir, the executor should have had them; but dower is favored in law; and it is a very ancient rule of common law, laid down, 2 Bracton, 96, that a widow, who is endowed, shall have land cultivated or not cultivated, with all the crops and produce growing thereon. By the common law, the tenant in dower could not (as all other tenants for life could) devise the emblements growing on the land; neither would the emblements, in case there was no devise, go to the executor of the wife, but they belonged to the reversioner. In all other cases, when it could not be known when the estate would end, if the tenant sowed the land, the executor of the tenant was entitled to the emblements; but as the widow was entitled, when endowed of lands, to the crops growing thereon, the rule of law was, that her executor or administrator should not be entitled to the crops growing on the land at her decease. By a statute of Henry III, the law

to secure the payment of the debt. *Fry v. Merchants' Ins. Co.*, 15 Ala., 810. The wife is not entitled, as against the mortgagee, to dower in lands which are conveyed to her husband, and by him, on the same day, mortgaged to his vendor to secure the payment of purchase-money. *Kelava v. Lepetre*, 21 Ala., 504.

(1) *Bac. Abr.*, tit. Dower, B. And in *Fisher v. Fisher*, *Vin. Abr.* Pl., 82, it is said that a dowress is entitled to the emblements, because dower is considered as an excrescence, or continuance, of the estate of the husband.

If the lands, upon which grass and fruits are growing at the time of the death of the husband, have been assigned to the widow for her dower, she thereupon becomes entitled to the grass and fruits growing on the lands. *Kain v. Fisher*, 2 *Seld.* (6 N. Y.), 597. But, until the assignment of dower, they belong to the heir *Ibid.*

[*55] was altered in favor of widows, and they were, by that a statute, placed on the same footing as other tenants for life were. If the statutes of England, enacted before the emigration of our ancestors, are rejected as not our law, in any State, then the common law, as above stated, is the law of that State.

Dower is considered as a continuation of the husband's estate. A dies, leaving B his son and heir; the widow is endowed of her husband's estate; the assignment of dower defeats the seisin of B, and he is considered as never having been seised. (1) If he should die before his mother, and leave a widow, who should outlive her husband's mother, she could not be endowed of that part of which her mother-in-law was endowed, for her husband had never been seised thereof, either in deed or in law. Or, if B had been a daughter, and had married, had issue and died, in the lifetime of her mother, her husband could never have curtesy in those lands of which the mother was endowed; for the endowment defeated the seisin of B, and B died without ever having been seised of the land. The wife is entitled to dower, by the English law, when the husband and wife were related within the Levitical degrees, if the marriage was not annulled during coverture; for, when that was ended, the marriage could not be impeached. If annulled during coverture, it was void *ab initio*. Of course, the wife could have no dower, and the issue were bastardized. Perk., 304.

In England, when there is a divorce for supervenient causes to the marriage, the divorce is *a mensa et thoro*, and is no bar of dower; for such dower does not dissolve the marriage. The authorities, however, are contradictory on this point. 1 Roll. Abr., 680; Noy., 108; Godb., 145; Co. Litt., 320. In other respects, we find that such a divorce has no effect in matters of property. If a wife so divorced should become entitled to a distributary share of the estate of some deceased relative, or if a legacy * should be given to such wife, the husband's right [*56] to such distributary share or legacy is the same as it would be if there had been no divorce, unless the legacy were given to

(1) *Fisher v. Fisher*, Vin. Abr. Pl., 82.

her separate use. Therefore, I apprehend that the symmetry of the law is better preserved by adopting the opinion that supervenient cases are no bar of dower. A divorce, then, for adultery, although the wife is the guilty party, will not bar her of her dower, if she live longer than her husband. By a statute of Connecticut, she is not entitled to dower if she is the guilty party; but is entitled if innocent. In such case, the court can allow the wife alimony; but this does not prevent her having dower. Alimony is to provide for her whilst her husband lives; but dower is a provision for her after his death. (1) Some opinions are to be found, that in case of banishment of the husband, by abjuration or act of Parliament, the wife may be endowed; for it is said that the husband is *civiliter mortuus*. There are other opinions that she cannot be endowed, except in the case of the natural death of the husband. Fitzh. De Nat. Brev., 149, adopts the latter opinion, whilst Jenks, Cent. 4, 181 case, adopts the former. If the banished man was by law treated as a dead man in other respects, the opinion in Jenks would be correct; but we nowhere find that such wife can marry again, or that the marriage is in any respect dissolved. I have never heard that it was ever claimed that the personal estate of such a one could be distributed to his personal representatives, or that his presumptive heir had become the real heir to his estate, or that administration was ever granted upon the estate of such a person; all of which must have taken place if he were considered as dead. I cannot conceive of any reason why the wife should be entitled to dower, because the husband is *civiliter mortuus*, which would not apply to the inheritance of the estate by the heir.

(1) A divorce *a vínculo matrimonii* bars dower, but, in case of such a divorce for the adultery of the husband, it is provided in the statute law of those States which authorize the divorce that a right of dower shall be preserved, or a reasonable provision be made out of the husband's estate for the wife, by way of indemnity for the loss of her dower and her husband's protection. 4 Kent's Com., 50; 2 N. Y. R. S., p. 145, sec. 45; Statutes of Connecticut, 180, tit. Dower; Statutes of Mass., 1785, ch. 69; Statutes of Ohio, 1824. In Vermont, where there is no such thing as a divorce *a mensa et thoro*, this species of divorce is a good bar to a dower. R. S. of Vermont, 1839, p. 326.

[*57] * If A lease his estate to B for life, reserving rent, and then marry, and die before the expiration of the lease, his wife cannot be endowed of the reversion, because he was not seised; for a life estate is a freehold estate, of which B was seised during the coverture. If the lease had been for years, she would have been entitled to dower; for in that case A would have been seised of the freehold.

By the statute of Connecticut, the wife is entitled to dower only in such real estate as the husband died possessed of. (1) I apprehend that the possession of any tenant, which is not an adverse holding to the husband, would be a sufficient possession of the husband to entitle the wife to dower; and that, in allowing

(1) From the uniform disposition of the courts of Vermont to protect the right of dower in the widow, it is presumed the doctrine of the author would there be held as good law, though precisely such a case is not to be found in the reports. The case of *Thayer v. Thayer*, 14 Vt. Rep., 107, affords so striking an illustration of this disposition, that, though it does not bear directly upon the point in question, it is deemed worthy of a short notice. The statutes of Vermont, like those of Connecticut, give to the widow dower only in those lands of which the husband died seised. In this case, Amherst Thayer, the husband of the oratrix, during his last sickness and in expectation of death, conveyed all his estate, real and personal, to one of the defendants, W. S. Thayer, his son, in trust for the said W. S. and the other defendants, all of whom were his children by a former marriage. There was no consideration for the conveyance but that of natural love and affection, and it was made to defeat the oratrix of her dower in the lands, and her share of the personal property of the husband. The question was, whether such conveyance operated to defeat the wife of her dower and right in the personal estate. The Chancellor below decided that such conveyance was void as against the claims of the wife, and set it aside. It came to the Supreme Court by exceptions. In delivering the opinion of the Court, marked for the ability with which every principle involved in the case is discussed, BENNETT, J., came to the conclusion that the oratrix had, in the lifetime of her husband, such rights as should be recognized protected and enforced in a court of equity; that the attempt to elude those rights in the manner disclosed in the case was *mala fide*, and a fraud upon the law and the marital rights of the oratrix, and that, as a consequence, the husband, as far as respects the widow, must be regarded at the time of his death as having the seisin of the property in question, and the decree of the Chancellor was consequently affirmed, with costs. Such a conveyance, if so framed as not to operate as a fraud upon the rights of the widow, would undoubtedly be valid; but this case is a strong authority in favor of the well-established principle that, where the wife is sought to be divested of any equitable right, it must be done in good faith, and without the least appearance of deceit and chicanery.

dower to the widow, the precise technical meaning of the word *possessed* has been disregarded. I should therefore suppose that the wife would be entitled to dower in the reversion, when the lease was to B for life; for such possession is not adverse to A. The rule of the English law, as has been stated, is, that the wife shall be endowed of one-third part of all the estate of inheritance that her husband was seised of during the coverture. It is said by Mr. Booth, an eminent counsellor, in an opinion by him given, that cases may arise where this rule could not be carried into execution. The case put by him is this: A sells to B Blackacre, B sells it to C, and C sells it to D, and D to E. A died, and his wife was endowed of one-third part; C died, and his wife was endowed of the remaining third; D died, and the three widows of A, B and C were living; so that there was nothing in Blackacre of which the wife of D could be endowed. This opinion of Mr. Booth is founded upon an incorrect view of the law on this subject. It is true that the widow of A must be endowed of one-third of Blackacre; but B's wife is not endowed of one-third of the whole, for her husband was never seised of that* third of which A's wife was endowed, for that is considered as a continuation of the husband A's estate; [*58] but the wife of B is endowed of one-third of what remains, after deducting the dower of A's wife; and when C died, his wife is endowed of one-third of what remains after deducting the dower of A's wife, and B's wife; and when D died, deduct the dower of A, B and C's wife, and endow the wife of D with one-third of what remains: that is, Blackacre contained nine acres; A's wife would be endowed of three; then six remains, of which B's wife would be endowed of two; there remains of this four acres; C's wife would be entitled to one acre and one-third; which left two acres and two-thirds, and D's wife would be entitled to one-third of this; the maxim is, *des de dote peti non debet*. Co. Lit., 81; 4 Rep., 121.

It has been a controverted question, when a jointure has fallen short of that value which the husband covenanted that it should have, whether a legacy, given to the wife by the husband, should be considered as a satisfaction for the deficiency: the current of

authorities is that it shall not, unless in the will it is expressed to be in satisfaction; but, to my mind, the authorities on this point are not reconcilable. 1 Atk., 440; 7 Bro. Parl. Ca., 461; 2 Eq. Ca. Abr., 392, 421. I find it difficult to reconcile the case, in the 1st of Atk., 440, with that in 2 Eq. Ca. Abr., 411. The case was this: A father and a son, on the marriage of the son, covenanted that the lands settled as a jointure for the son's wife were worth £300 per annum; the son in his will gave his wife £1,000. In this case, Lord HARDWICKE held, that the legacy was no satisfaction for the deficiency of the jointure; for, to make it so, the devisor must have so intended; but he could not at the time of the devise have so intended, for deficiency had not at that time arisen, and would not until after his death. The case [59] in 2 Eq. Ca. Abr. was this: The father, on the * marriage of his son, settled lands on the wife of his son, for her life, and covenanted that they were of the yearly value of £1,000; the father died, and the son devised other lands to the wife, of the yearly value of £500 for life, together with a legacy of £1,000, and all his household goods. There was in this case, as there was also in the case in Atk., a deficiency of the covenanted value of the jointure; and Lord Chancellor COWPER held that the legacies ought to go in satisfaction of the deficiency of the jointure. (1)

Whether a femme infant's right to dower could be barred in equity, by a competent equitable jointure, as where an annuity was settled upon her, as a jointure, not secured on real property, it is now settled that such jointure may bar a claim of dower; but it must not depend on any uncertain or contingent event, when she shall come to the enjoyment of her jointure. 4 Bro. in Chan., 500. That personal property may be in equity a bar of

(1) Some cases have even gone further than the doctrine of the text, which is doubtless the correct one. In *Grove v. Hook*, 4 Bro. P. C., 593, it is held that where lands are settled in jointure, and covenanted to be of a certain annual value, but the husband, afterwards discovering a defect in the title, settles other lands as an additional jointure, and declares them to be in recompense of all deficiencies, either in title or value of the lands before settled, the jointress shall have lands of the full value mentioned in the original jointure, over and above the other lands, and all provisions made for her in her husband's will.

dower, settled on an infant wife previous to marriage, has been determined in the 3d of Ves., 545; but when the provision was uncertain, and depending on the circumstances of the husband at his death whether it will be realized or not, the court held that it was no bar of dower. Such a settlement of personal property by marriage articles, by the husband on the wife, an infant, in bar of her claim to her share in the personal estate of her husband, under the statute of distributions, will extinguish such claims, provided it is so expressed in the articles. Here it will be noticed, that the widow has no indefeasible claim to a distributary share, as she has to dower: thus he may deprive her of, or direct in what manner she should have, any of his personal estate. (1)

*CHAPTER IV.

[*60]

THE HUSBAND'S RIGHT TO PROPERTY OR CHOSSES ACCRUING TO HIS WIFE DURING COVERTURE. HIS RIGHT TO DAMAGES ARISING FROM AN INJURY TO HER PERSON DURING COVERTURE. HIS RIGHT TO HER SERVICES DURING COVERTURE; AND TO PROPERTY ACQUIRED BY SUCH SERVICE. THE PARTICULAR INJURY OF CRIMINAL CONVERSATION WITH HIS WIFE: AND HIS POWER OVER HER PERSON.

If personal property be given to a wife, as a legacy by will, or if given to her in any other manner, and there are no words indicative of the intention of the donor that it shall be to her separate use; such property belongs absolutely to the husband, and does not go as choses in action, which the wife owned at the

(1) See note, page 43 (marginal).

In a proceeding for partition, dower cannot be assigned. *Tanner v. Niles*, 1 Barb., 580. Long cohabitation and general reputation are sufficient evidence of marriage to make a *prima facie* case on behalf of the claimant of dower. *Young v. Foster*, 14 N. H., 114. The interest allowed by law to the widow in the personalty of her deceased husband is considered, in Mississippi, as *dower* therein, and must be proceeded for in the probate court in the mode pointed out by statute. *Oulleret v. Bernard*, 7 Sm. & Marsh, 316.

time of her marriage. Such choses, if the wife survives, will belong to her, if not collected during the coverture; and if she die first, he takes them, as administrator to his wife. But in the case of personal property acquired after marriage by her means, such property belongs absolutely to the husband; so that if a legacy should be given to the wife, during coverture, and the husband should die before it is paid or due, it would not belong to the wife, but to the husband's executor. (1)

(1) Kent's Com., 135; Garforth v. Bradley, 2 Ves., 675; Schuyler v. Hoyle, 5 John. Ch. Rep., 196; Haviland v. Bloom, 6 id., 178; Wildman v. Wildman, 9 Ves., 174. And where a legacy was given to a *femme covert*, who lived separate from her husband, and the executor paid it to the *femme*, and took her receipt therefor, yet, on a bill brought by the husband against the executor, he was decreed to pay it over again, with interest. Salk., 115. If husband and wife are divorced *a mensa et thoro*, and a legacy is left to the wife, the husband may release it. 1 Roper, 241. And in Lewis v. Lee, 3 Barn. & Cress., 291, it was held that a woman divorced *a mensa et thoro*, and being separate from her husband, could not be sued as a *femme sole*, and it would follow, of course, that the husband might release her legacy. The same doctrine is explicitly recognized in Russell v. Brooks, 7 Pick., 65, and Dean v. Richmond, 5 id., 461.

For statutes of different States, affecting this question, see note 1, page 1, *ante*. It was held in Dold v. Geiger, 2 Gratt., 98, that creditors of the husband will not be deprived of the *choses in action* which come to the wife during coverture, by their settlement upon the wife with the husband's consent, he not having reduced them to possession. See also Holbrook v. Waters, 19 Pick., 354; Wheeler v. Bowen, 20 id., 563. In the case of Westervelt v. Gregg, 12 N. Y. (2 Kern.), 205, held, that "a legacy, or distributive share, accruing to the wife, is regarded as a *chose in action*, and, as far as the rights of the husband are concerned, it stands upon the same footing as a promissory note, or other property of similar character. The general rule of the common law is, that the husband has the right to reduce the *choses in action* of the wife into possession, but that, until he does so, they do not vest in him as his own property, and in case he dies, in the lifetime of his wife, they survive to her." Schuyler v. Hoyle, 5 John. Ch., 196; 2 Kent Com., 137; Wintereast v. Smith, 4 Rawls, 183.

The authorities are conflicting as to the question whether the husband's creditors can subject to the payment of their debts a legacy or distributive share which comes to the wife during coverture, and to which the husband neglects to assert any claim. Such power was denied in the case of Wheeler v. Moore, 13 N. H. B., 478; Coffin v. Morrill, 2 Foster (N. H.), 352; Gallego v. Gallego, 2 Brock. R., 287. For the contrary doctrine, see Wheeler v. Bowen, &c., above. In Vance v. McLaughlin, 8 Gratt., 289, it was held that an attachment by the husband's creditors of the wife's interest, as legatee, in the hands of an executor, creates only a *lien*, which will be defeated by the death of the husband pending the suit.

So, too, if a bond or note be given to her, it is in the same predicament. They are his property absolutely, so that he may institute a suit upon such bond or note given to his wife, in his own name, without joining his wife. (1)

* It must, however, be admitted, that there are authorities which teach a different doctrine from this, in some [*61] respects. It is not contended but that the husband may sue alone, as is before stated; neither do I know that it is pretended that if the wife die before the husband, that he takes such choses as administrator; but it is decided, by most respectable authorities, that if the husband die before the wife, not having collected them, they would survive to the wife. This doctrine is held to be correct in the 2d of Vesey, but a different doctrine is holden in other books. (a) See 1 vol. of Comyns and the other cases there cited. I have, in this chapter, asserted the doctrine in Comyns to be the correct doctrine; for that preserves the symmetry of the law, while the other destroys it. For, in any other case where a claim survives to the wife, on the death of the husband, not being reduced to possession, the husband must join the wife in a suit to recover that claim. But it is allowed by all, that, in case of property accruing to the wife during coverture, there is no necessity of joining the wife. (b)

There is an authority that a distributary share that comes to a woman during coverture belongs to the husband exclusively, and, if he die intestate, goes to his administrator.

In Cro. Jac., 205, there is an authority which proves that an action on a promise to the wife, to pay to her so much for her services, can be maintained in her name and her husband's. It is manifest that she has no possible interest in the thing promised,

(a) 2 Ves., 676; 2 P. Wms., 497; Com. Dig., 555.

(b) 2 Ver., 302.

(1) Bac. Abr., tit. Baron and Femme; Barlow v. Bishop, 1 East., 432; 1 Chit. Pl., 30; Co. Litt., 351, b; 2 Kent's Com., 142. But where there is an express promise made to the wife, she may join in the suit; or the husband may sue alone. Ankerstein v. Clark, 4 Term, 616, and cases there cited. Schoonmaker's Execrs. v. Elmendorf, 10 John. Rep., 49.

for it belonged to her husband, and he might have brought the action in his name alone. (1)

I have laid down the rule respecting the exclusive right of the husband to such choses as come to the wife during coverture, as it has always been holden to be at law; and it may be said, that, in a court of law, the rule, as laid * down, is the only rule [*62] known to such court; but when we examine the various decisions in chancery, on the subject of the right of the wife by survivorship on the death of the husband, to those choses which came to her during coverture, which have not been reduced to the possession of the husband in his lifetime, we shall perceive that the rule in chancery is very different from the rule in courts of law; for it is most apparent that at law she was not considered as entitled to them as she was to her other choses, but they belonged to her husband's executor. So Baron COMYNS lays down the rule to be, and the right of the husband to maintain a suit in his own name, in such cases, when, in all other cases where there is a survivorship to the wife, the husband is obliged to join the wife; for, if he did not so do, her right of survivorship would be defeated if he should obtain a judgment in his own name alone and die before it was collected: his executor, by virtue of that judgment, would collect the debt, when neither he nor her testator's estate had any right to the debt, unless collected during coverture. But it cannot be denied that chancery has taken a different course. By the rule of that court, such property survives to the wife; and since, in every such case, resort may be had to chancery, it amounts, in effect, to this, that such property does, in case of the death of the husband, if

(1) Nor does this authority stand alone. *Oro. Eliz.*, 61; *Philliskirk v. Pluckwell*, 2 Maule & Sel., 393; *Lewis v. Martin*, 1 Day, 263; 1 Chit. Pl., 20. But see *Jackson v. Vanderheyden*, 17 John., 271. It is clear, however, in these cases, that the husband might sue alone, but the advantage of joining the wife is, that, if the husband die after judgment, and before it is satisfied, or while the action is pending, the interest in the cause of action will survive to the wife, and not to the executors of the husband, though if he sued alone she would have had no interest. If the wife is not joined in an action on note given to her during coverture, a debt due from the wife *dum sola* cannot be set off against it. *Burroughs v. Moss*, 10 Barl. & Cress., 558.

not collected, survive to the wife; and yet the husband is not, in such case, although he is in all others, bound to join his wife in a suit to recover such choses, as long as this can be done. The symmetry of the law is marred, and cannot be restored without compelling the husband to join the wife in such suit, or adopting the rule as it is at law, that her choses, which come to her after coverture, are absolutely his. I thought it proper to present a view of the law, as it was understood in the courts of law, and also the revolutions that the doctrine on this interesting *subject has undergone in chancery; and I believe there have not been, in any State, that course of decisions on [*68] this subject from which we may judge which rule will probably be adopted in this country. (1)

Although the husband is thus entitled to all the property which the wife acquires during the coverture, yet, if damages be claimed for an injury to her person or reputation during coverture, those damages belong to her, and she must be joined with the husband in the suit. (2) When damages for such an

(1) With deference to the general correctness of the author's conclusions, it is believed that the rule is not here stated with sufficient precision. The rule adopted by the American chancery courts, that the property of the wife shall never become the subject of chancery jurisdiction, without her equities attaching upon it, is dictated by a wise and generous policy; but it may be questioned whether this rule would be extended to include the uncollected choses of the wife accruing to her during coverture, in all cases. These, according to the doctrine of the text, *at law* vest in the husband before collection, and the instant the wife acquires a perfect right of action to them they become, to all intents, the property of the husband. Now, does the rule in chancery extend further than has been several times declared in the New York chancery courts, that out of these choses the wife is entitled to a reasonable provision for her own and her children's support? Or, does the fact that the property came in her right constitute such an equity as, in opposition to this rule of law, entitles her to the whole, in a case where the property would constitute more than a reasonable provision? The former proposition seems to be the more correct one. This equitable right of the wife has been sufficiently shown in a former note, and it is only necessary to add, that, in New York, this equitable privilege holds good, with regard to the real and personal estate of the wife, *descended or devised to her during coverture*. This equity prevails equally against the husband, or any assignee of his, or lien created by him, even for a valuable consideration. *Haviland v. Bloom*, 6 John. Ch. Rep., 178; *Kenney v. Udall*, 3 Cow., 590.

(2) *Hopper v. Reeve*, 1 Moore, 174; *Donaldson v. Maginnis*, 4 Yeates, 137. See also *Perry v. Boileau*, 10 Serg. & Rawle, 208; *Boggett v. Friar*, 11 East., 301.

An action cannot be sustained by husband and wife, for the battery of the wife,

injury are collected, they belong to the husband; but in case of his death before they are reduced to possession, they survive to the wife, in the same manner as if the injury had been received before marriage. (a) (1) From such injury, two actions may arise: as, in the case of a battery of the wife, the husband and wife can bring an action to recover for the injury done to her, and the husband may bring an action in his own name to recover damages which he sustained by reason of the battery, which is termed an action of trespass *per quod consortium amisit*, in which he will recover for the loss of the company of his wife, if that have been the case, for the loss of her service, and also for expense which has arisen by reason of the battery. (b) (2) The

(a) Yel., 89; 1 Brownl., 205; 1 Rol., 380; Cro. Jac., 501, 586; Cro. Car., 90; 1 Salk., 119, Jones, 440.

(b) 1 Salk., 206; 1 Lev., 140; 1 Sid., 346; Cro. Jac., 501; 2 Rol. Abr., 556; Stran., 97.

where the injury is shown to have been committed with her consent. *Pillow v. Bushnell*, 5 Barb., 156. An objection to the joinder of the husband with his wife as plaintiff, should be taken on demurrer; It is too late to take it at the trial. *Hunt v. Johnson*, 19 N. Y. (5 Smith), 279.

(1) 1 Chit. Pl., 61; Ld. Raym., 1208. But if the wife die after judgment, the judgment survives to the husband. *Stroop et ux. v. Swarts*, 12 Serg. & Rawle, 76.

(2) Bac. Abr., tit. Baron and Femme, K. But where the action is brought for words spoken of, or other tort done to the wife, and founded upon the special damage done to the husband, she must not join. Sid., 346; Lev., 140; Keb. Rep., 791; Pl., 47.

Where the wife is killed instantly by a collision of railroad cars, her husband cannot, at the common law, recover, because the action is founded on the loss of services and the society of his wife, and in this case there is no time *during her life* when it can be said that the husband has lost her services or society. *Green v. Hudson River R. R. Co.*, 28 Barb., 9. But, under the statute of 1847, an individual, as administrator of his deceased wife, whose death was caused by the negligence of the defendant, may maintain an action for such death. *Dickens v. N. Y. Central R. R. Co.*, 28 Barb., 41. Loss of services from illness occasioned by defamatory words, not in themselves actionable, will not support an action by the husband. *Wilson v. Golt*, 17 N. Y. (3 Smith), 442. Held, in *Johnson v. Dickens*, 28 Mis., 580, that a husband could not sue for slanderous words spoken of his wife without joining her in the suit. Under the act of 1848, in regard to the rights of married women, in Pennsylvania, held that the wife may maintain an action for slander without joining her husband. *Rangler v. Hummel*, 37 Penn., 130. And in New York, under section 7, chapter 90, Laws of New York, 1860, "any married woman may bring and maintain an action in her own name, for damages against any person or body corporate, for any injury to her person or character, the same as if she were sole; and the money received upon the settlement of any such action, or recovered upon a judgment, shall be her sole and separate property."

husband may, in an action for a battery on himself, in the same declaration, demand damages for a battery to his wife *per quod consortium amisit*. (1) The husband is also entitled to all the property which the wife acquires by her labor, service, or act, during coverture. (2)

If any man should carry away the wife of another man, it is a trespass, for which a recovery of damages may be had by the husband. (3)

The husband is entitled to an action for criminal conversation with his wife. In form, this is an action of trespass, *vi et armis*; but, in substance, it is an action on the case for the seduction of the wife, the alienation of her* affections from the husband, and exposing him to shame, ridicule, and the hazard [*64] of maintaining a spurious issue. A rigid adherence to a maxim, that has not the least foundation in common sense, that a wife has no will, occasioned the form of the writ to be that of trespass *vi et armis*, proceeding upon the ground that a wife was destitute of a will, and therefore could not have consented to commit adultery, but it must have been altogether a matter of violence. (4)

(1) So he may bring the action alone for the battery, and carrying away of the wife *per quod*, &c., for the action may be founded on the special damage done to the wife. *Bac. Abr.*, tit. Baron and Femme, K; and cases there cited.

(2) By the Laws of New York, 1860, ch. 90, sec. 1, whatever the wife acquires by her trade, business, labor or services, is declared to be her separate property.

(3) A father may receive his daughter into his house, where the character of the husband is such as to excuse her leaving him, and even advise her to leave her husband, and no action can be maintained against him for enticing her away. *Bennett v. Smith*, 21 Barb., 439; see also *Hutcheson v. Peck*, 5 John., 196. To justify interference to remove a man's wife from his house, the defendant is bound to show that she was abused, nor will the mere statement of the plaintiff's wife, that she was abused by her husband, without any proof of such abuse, be a justification for the defendant's advice to her to leave her husband. Whenever the wife is not justifiable in leaving her husband, he who knowingly and intentionally assists her in violating her duty is guilty of a wrong for which an action will lie. *Barnes v. Allen*, 30 Barb., 663.

(4) This branch of the law of husband and wife, in the United States, possesses the quality of uniformity in a higher degree than many others. The method of prosecution and the measure of damages seem to be based entirely upon the English theory. And, though involving some singular anomalies, the law, as declared in the text, has been adopted by nearly if not quite all the English and American

Although this maxim has given form to the action brought in this case, which considers the defendant as a ruffian, who accomplishes his purpose by brutal violence, and not as an unprincipled seducer, who, by art and intrigue, commits the greatest of all injuries; yet, in the proceedings thereon, and the acknowledged causes for damages, common sense has prevailed. It is considered, as it respects costs, an action on the case; for, although the plaintiff should recover less than forty shillings, yet he has full costs, which would not be the case if the action were considered as an action of trespass *vi et armis*. If the husband be privy to this conduct of his wife, or consenting to it, there is no ground for damages: he, in such case, is the seducer, and has no right to complain. (a) The more early cases supposed such conduct went in mitigation of damages, but the later cases deny all right to recovery. (b) (1) Neither can his action be maintained when the husband and wife live separate, under articles of separation, for any act of adultery committed by her, after the separation took place. (2)

If the character of the wife were debased before the criminal conversation, the damages would be much less than if she had, before the seduction, maintained a fair reputation for chastity. (3) In this action, it is not sufficient to prove a marriage by reputa-

(a) Wms. Abr., 133, 133, 134. (b) Bal. N. P., 37; 1 T. R., 651; 3 id., 357.

courts which have had cases involving its principles under their cognizance. The following cases all recognize the right of the husband to maintain an action for the seduction of his wife: *Morris v. Miller*, 4 Burr., 2057; *Birt v. Barlow*, Doug., 171; *Duke of Norfolk v. Germaine*, 8 St. Tr., 35; *Buller's Nisi Prius*, 28; *Frelaconey v. Coleman*, 1 Barn. & Ad., 90; *Edwards v. Crook*, 4 Esp. Cas., 39; *Hoare v. Allen*, 3 id., 178; *Wyndham v. Wycomb*, 4 id., 16; *Stuart v. Blandford*, there cited; *Bromley v. Wallace*, 4 Esp. Cas., 237; *Hodges v. Wyndham*, Peake's Cas., 37; *Duberly v. Gunning*, 4 Term Rep., 655; *Weedon v. Timbrel*, 5 id., 357; *Canefield v. Chamber*, 6 East., 244; *Torre v. Sumners*, 2 Nott & McCord, 287; *Fry v. Derstler*, 2 Yeates, 278; *Forney v. Hallaker*, 3 Serg. & Rawle, 159; *Gardner v. Madeira*, 2 Yeates, 466.

(1) *Gibber v. Sloper*, Bull. N. P., 27; *Hodges v. Wyndham*, Peake's Cas., 39; *Duberly v. Gunning*, 4 Term R., 655; *Travis v. Barger*, and cases, 24 Barb., 614.

(2) *Fry v. Derstler*, 2 Yeates, 278.

(3) *Roberts v. Malston*, per WILLMS, Ch. J., Hereford, ss. 1745; *Buller's N. P.*, 296; *Ellam v. Fawcett*, 2 Esp. Cas., 562; *Torre v. Sumners*, *ut supra*.

tion; but a marriage in fact must be proved, which may be by any person present at the marriage, as well as by a copy of the register. (a) (1)

* I apprehend it will be found difficult to ascertain, with [*65] exactness, what power the husband has over the person of his wife. According to the ideas once entertained upon this subject, in the country from which our ancestors emigrated, the husband seems to have had the same right over the person of his wife that he had over the person of his apprentice: to chastise her moderately or confine her; a right still claimed and enforced in that country, among the lower ranks of society.

In Connecticut, it is not to be denied, that there are to be found brutal husbands who abuse their wives; but the right of chastising a wife is not claimed by any man; neither is any such right recognized by our law.

In the reign of Car. II, a reign productive of much evil and some good, wives began to receive a more liberal treatment. Their rights were better understood than heretofore. They assumed more the character of companions than of servants to their husbands. Their claims to exemption from the operation of the before-mentioned principles have gained additional strength from the increased refinements of modern times.

I much doubt whether the law of England would indulge the husband in correcting a wife on the same ground that it would warrant his correction of a servant or a child. There is no doubt but that there are cases in which a battery by the husband of the wife may be justified on the ground of absolute necessity to repel an injury offered by her; and it is equally true, that a battery of the husband by the wife may be justified on the same grounds. The nature of the connection between them is such, that no atrocity of conduct in this respect can give either a right to an action to recover damages; but a violation of each other's rights, by an unjustifiable violence, is a breach of the laws of

(a) 4 Burr., 2057; 1 Bl., 622; Bul. N. P., 26; Bent v. Barlow, in Douglas.

(1) 2 Starkie's Ev., 438; Kibby v. Ruckee, 1 Marsh, 391; Morris v. Miller, Burrow, 2057

society, for which they are liable *criminaliter*, and, by law, they may institute * a process against each other, the object of [*66] which is to compel them to find securities for their good behavior. (1)

This seems to be settled, that, if a wife elope and go away from her husband without cause, that the husband may seize upon her person and bring her home; and it is said that he may imprison her to prevent her going off with an adulterer, and also to prevent her from destroying and squandering his property. (a) (2) The husband may use such force as is necessary to restrain a wife who is insane; but the court will never take away a wife from a friend to whom she has fled to escape the effects of his brutality, and order her to be delivered to her husband. In the case in Burr., the wife had sworn the peace against her husband. (b)

(a) *Str.*, 875, 478; *Hawk.*, 130; *Moor.*, 874; 1 *Sid.*, 113; 2 *Lev.*, 138; *Str.*, 1307.

(b) 3 *Burr.*, 1622; 4 *id.*, 1901.

(1) The ancient English cases admitted an extraordinary degree of power in the husband over the person of his wife. *Fitz. Nat. Brev.*, 80; 1 *Bl. Com.*, 444. But it is very questionable whether the rule, as it is now understood in England, applies to any of the United States. Judge KENT extends the authority of the husband over the person of his wife, only to putting gentle restraints upon her liberty. And in Pennsylvania it is the constant practice to punish the husband for an assault upon his wife. Judge BOUVIER's note in *Bac. Abr.*, tit. *Baron and Femme*, B. And such is deemed to be the law in New York and Vermont. See also *Rex v. Mead*, 1 *Burr.*, 542; and *Lester's case*, 8 *Mod. Rep.*, 22.

A husband has no right to inflict corporal punishment on his wife, but may defend himself against her, and restrain her from acts of violence against himself and others. *People v. Winters*, 2 *Parker C. R.*, 10.

(2) *Bac. Abr.*, tit. *Baron and Femme*, B; 2 *Strange*, 1207.

*CHAPTER V.

[*67]

THE HUSBAND'S LIABILITY TO PAY THE DEBTS OF THE WIFE DUE FROM HER BEFORE COVERTURE, AND TO PERFORM HER OTHER DUTIES. HIS LIABILITY TO ANSWER FOR HER TORTS AFTER AND BEFORE MARRIAGE: HER OFFENCES AFTERWARD. HOW FAR SHE IS DISCHARGED FROM LIABILITY FOR TORTS DURING COVERTURE: AND FROM PUNISHMENT FOR CRIMES ON THE GROUND OF PRESUMPTION OF COERCION BY HER HUSBAND.

WE have seen what advantages the husband derives, in a pecuniary view, from marriage; we will now attend to his liability to loss, in the same point of view.

It has been already noticed, that, by marriage, the husband becomes liable to pay the debts of the wife, provided that these debts be collected during the coverture; and that, whenever the coverture is at an end, his liability, in this respect, has ceased. Some further observations on this subject may not, however, be useless.

It is wholly immaterial whether he acquire any property or not by the marriage. His liability does not depend, in the smallest degree, upon his having received property by his wife. If he have received a large estate with her, he is answerable for no debt which is not collected during coverture. On the other hand, if he have received no property with her, he is liable for all her debts, provided they are sued for and collected during coverture.

A marries B, who owes, at the time of her marriage, \$1,000, and has in possession \$10,000. By the marriage the \$10,000 are vested absolutely in A, the husband; and *he is liable to pay her debt of \$1,000. But if B should die at any [*68] time after the marriage, before the creditor could collect his debt, the husband is not liable to pay it. If the wife were not owner of any choses or real estate, the creditor has lost his debt. So, on the other hand, if the husband had died before the debt was collected, his executor would not be liable, for the coverture

is at an end. (a) The widow, however, will be liable to pay this debt, although she may be utterly destitute of any property wherewith to pay it. It is very possible, that she may receive no estate from her husband. If he had no real estate, she can have no dower; and, as to the personal property, the whole of it may be wanted to pay his debts, or may be devised away from her. (1)

By the general principles of law, the property of one person cannot be transferred to another, by operation of law, to the prejudice of creditors; yet in this case it can. The debt of a *femme sole* is not, on her marriage, considered as transferred to her husband. If it were, he or his executor would be liable after the coverture was at an end. In that case, it would not, on his death, survive against his wife; neither would there be any propriety in joining the wife with the husband in a suit to collect the debt of the wife; which, however, must be done.

The true principle on which the husband is liable to pay the debts of the wife is, not that he has received property by her, or that she is considered unable to pay her debts, by reason of her property having passed to her husband. If this were the principle, he would be liable only when he had received property with her, and then liable only to the extent of the property received. If her inability to pay furnished the true ground of his liability, then, in case of his death, she, having been, by reason of the consequence of her marriage, rendered utterly incapable of paying her debts, would not be liable, but the*
[*69] executor of the husband would be liable. The law, however, is otherwise. The principle which governs in this case is

(a) 1 Roll., 351; 3 Mod., 186; Tal. Co., 173; 3 P. Wms., 400.

(1) Ante, page 52, *note at seq.*; *Woodman v. Chapman*, 1 Camp., 189; 2 Kent's Com., 143, S. P.

In New York, the husband is liable for debts of the wife contracted before marriage, only to the extent of the property of the wife acquired by him through the marriage, or by an ante-nuptial contract. *Laws of New York*, 1853, page 1057. And under this act, and those of 1848, 1849, and 1860, this liability of the husband is narrowed down to the case of property acquired through the wife by an ante-nuptial contract. See also vol. 1, R. S. of Indiana, 1852, ch. 52, page 320, sec. 1; Statutes of Minnesota, 1849, 1858, ch. 40.

this: that the wife cannot be imprisoned upon a civil process, without her husband. It is therefore necessary that he should be joined in the suit with the wife, that judgment may be rendered against him as well as against her. If it were against her alone, she might be taken in execution and confined in prison, without the means of relieving herself from confinement. That property which, before marriage, was her personal estate, now belongs to her husband, and is at his disposal. The usufruct of her real estate also belongs to him; and whatever she may acquire by her industry is his. The law, therefore, will not place her in a condition altogether dependent on the good will of her husband. He must also be imprisoned, as well as his wife. This will be a sufficient inducement for him to exert himself to discharge the debt of his wife, that he himself may be released from prison. Whenever the husband is released, the wife is also released. Even when the husband breaks jail and escapes, the wife must be released. The law upon this subject, I believe, is as follows: When legal proceedings are had against the husband and wife, on *mesne process*, and the wife is arrested; if the husband abscond and cannot be taken, the wife must be discharged; for she shall not be imprisoned without her husband. If both are arrested, she shall be discharged, upon filing common bail, if the husband be bailed. If he go to prison, she will be imprisoned, unless she find substantial bail. (a) If, on the trial, the husband be acquitted, no judgment can be rendered against the wife, although there is a verdict against her; for she shall not be liable to be imprisoned without her husband. If the husband and wife be surrendered after judgment against them, and he be not charged in execution, she shall be discharged out of custody, upon filing common bail. If * execution have issued, it seems to be a question whether the wife [*70] can be taken and confined without her husband. I believe it to be a principle not to be departed from, that a wife, deprived of the means of paying her debts, shall not be held in prison, unless the husband is also holden. (1)

(a) 2 Stra., 1187, 1273; 1 Wils., 124; Barnes, 96; 2 Bl., 720; 1 Vent., 49.

(1) The modern English reports furnish many cases in which the liability of the wife to imprisonment on *mesne process*, or execution for debts due from her *dum*

I know that it is said, when she is taken on execution against her and her husband, although her husband is not taken, that she shall not be discharged. The truth, I apprehend to be, that the wife may be taken, although the husband be not taken; but if the husband abscond and cannot be taken, the wife must be discharged. She may be holden until a reasonable time has elapsed for taking the husband, and no longer. One thing is certain, that if the husband and wife be both taken and confined in jail, and the husband escapes, the wife must be discharged. She may be held, in that case, a reasonable time, that the husband may be retaken; but if he go off, she cannot be holden.

(a) (1)

In the case of *Wardell v. Gooch*, reported in 7 East, 582, a married woman was discharged, on filing common bail, from an arrest for a debt contracted by her, living on a separate maintenance. It does not appear that there was any covenant to live

(a) Seld., 385; 1 Vent., 51.

sole, is very fully discussed. As furnishing a reason why the liability of the husband for the debts of the wife should cease upon the dissolution of the coverture, they may be worthy of consideration; but as in most of the United States the debtor is no longer liable to imprisonment in actions *ex contractu*, except in a few instances, specially enumerated in the statutes, the necessity of a thorough knowledge of this branch of the law is in a measure superseded. In Vermont, by express statute provision, females cannot be imprisoned in actions upon contract, and the same humane provision exists in many of the other States. Rev. Stat., Vt., 1839, p. 88.

The general proposition that, where husband and wife are both arrested, the wife will be discharged upon filing common bail, is correct, for the reason that nobody can be supposed to undertake for a wife who has no property of her own; but this rule has its exceptions. If it is made satisfactorily to appear that the wife has *willfully* and *mala fide* represented herself to the plaintiff as a *femme sole*, the courts will not relieve her, but they will if it appear that the credit was given to her as a *femme covert*. *Waters v. Smith*, 6 Term Rep., 451; *Pitt v. Thompson*, 1 East, 16; *Crookes v. Fry*, 1 Barn. & A., 165; *Collins v. Rowed*, 1 New Rep., 54; *Pritchard v. Cowland*, 2 Marsh., 40; *Parnell v. Taylor*, 1 Turn. & Ry., 100; *Harvey v. Cooke*, 1 Barn. & A., 747; *Holloway v. Lee*, 2 Mod., 211; *Carlisle v. Starr*, 9 Price, 161.

(1) See *Commonwealth v. Badlam*, 9 Pick., 362; *McKinstry v. Davis*, 3 Cow., 399. But if it appears that she has no separate property to discharge the debt, she will be discharged from imprisonment. *Sparks v. Bell*, 8 Barn. & Cress., 1; 2 Mann. & Ry., 124.

separate. There was, indeed a separate maintenance, as long as they lived separate, but he might reclaim her when he pleased. His marital rights might then have been affected, if she were not discharged on filing common bail. Whenever, therefore, the coverture is at an end, the reason of his liability ceases. One case alone can be found, which forms an exception to this rule, which is, when a woman is sued before marriage, and during the pendency of the suit she marries, in this case, the judgment and execution must follow the original process; and although she be married, she is taken in execution by her maiden name, and may be imprisoned on such execution without her husband.

* There is a case in Style, 138, where a suit was brought for slander, against husband and wife, for the slander of [*71] the wife. Pending the suit the husband died, and the wife married another husband. The court inclined to the opinion that the plaintiff's writ would abate.

This, I apprehend, is opposed to the current of authorities. It is in itself unreasonable that a *femme* defendant should have it in her power, by her own act, to abate the plaintiff's suit. (1)

If a *femme sole* plaintiff should marry, it would be reasonable that her suit should abate, for it was her own act.

The rule laid down, that the husband is never liable for the debts of his wife after coverture is at an end, may perhaps be considered as inoperative in the following case; though, in that, it is literally true. If husband and wife are sued for the debt of the wife, and judgment is obtained against them, and before judgment is collected the wife dies, yet the husband must pay the debt. It should be observed, however, that, by the judgment, the debt becomes the debt of the husband as well as of the

(1) *Sed Qa.* Was the suit in that case abated by the marriage of the wife, or was the death of the husband the cause of abatement?

In New York, "no action shall abate by the death, marriage, or other disability of a party, or the transfer of any interest therein, if the cause of action survive or continua." And, in such cases, "the court, on motion, at any time within one year thereafter, or afterwards on a supplemental complaint, may allow the action to be continued by or against his representative or successor in interest." New York Code, sec. 121; Compiled Statutes of Vermont 1850, page 402, sec. 8

wife. The husband, therefore, notwithstanding the death of the wife, is bound to pay it. (a) (1)

Although the husband is not liable for the debts of the wife *dum sola*, after coverture is ended; yet, if the debt were contracted for certain articles, which came to the use of the husband after the death of the wife, chancery will decree that he pay such debt. (b)

The debts of the wife, contracted while sole, are discharged by the bankruptcy of the husband; and, in case of his death, will not survive against her. (c) (2)

The husband is not only liable to pay the debts contracted by the wife whilst a *femme sole*, but he is also liable for her torts committed before marriage, provided the damages are collected during coverture. *She must be joined with him in the suit; for she is also liable. In case of his death, before [*72] damages are recovered, she alone is liable. (d) In case of her death before damages are recovered, he is not liable; for the coverture is at an end. He is not liable as her administrator, if she have left choses in action, although he is for the payment of her debts to the extent of assets; for being a tort, it dies with the person. (e) (3)

The husband is liable for her torts committed after marriage. (4) If they were committed by his order, or in company

(a) 1 Sid., 387.

(b) 1 Eq. C. Ab., 60.

(c) P. Wms., 242, 357.

(d) 1 Leon, 312.

(e) 1 Roll., 6.

(1) So if the husband and wife had recovered in the right of the wife, and had judgment, the husband might sue out execution after the death of the wife. Cro. Car., 208; Salk., 116; pl. 7; Carth., 415; 2 Ld. Raym., 1050.

The husband, as administrator of his deceased wife, is bound to pay her debts to the extent of the assets received by him. And, "if he take out letters of administration on her estate, he shall be presumed to have assets in his hands, sufficient to satisfy her debts, and shall be liable therefor." New York R. S., 5th ed., vol. 3, ch. 6, sec. 29. And it was held, in the case of *Lockwood v. Stockholm*, 11 Paige, 87, that, if the husband intermeddles with his deceased wife's property, without taking out letters of administration on her estate, he would be liable for her debts.

(2) *Lockwood v. Salter and wife*, 2 Neville & Manning's Rep., 255; Sparks v. Bell, 8 Barn. & Cress., 1.

(3) 1 Ohit. Pl., 77, 79; *Hank et ux. v. Harmun et ux.*, 5 Binn., 43; Bac. Abr., tit. Baron and Femme, L.

(4) 2 Kent's Com., 149. The husband and wife should be joined as co-defendants in an action for the tort of the wife, although it was the sole act of the wife. *Matthews v. Priestil*, 2 E. D. Smith (N. Y.), 90.

with him, he alone is liable. In case of his death, they do not survive against her; for, in those cases, they are not considered as the torts of the wife, but of the husband. She is excused from any liability, upon the ground of a presumed coercion by the husband. Here it may be worth notice, that this is a singular ground on which to excuse a tort. It is not to be found in other cases. No servant, or other person, except a wife, when coerced by the order of his superior to commit a tort, is excused from being liable in damages to the person injured. If the tort be not committed in the presence of the husband, or by his order or request, the husband is liable. (a) (1) In this case, however, the wife is also liable, and must be joined in the suit with her husband. The wrong is, in such a case, considered as her wrong; and the husband is answerable with the wife, for reasons before given for his liability for her contracts made before marriage.

A query is suggested by the editor of Palmer's Reports, whether there is any remedy where a *femme covert* takes up goods of a tradesman, affirming that she is a *femme sole*. In such a case, if the goods come to the use of the husband, he will be chargeable on the implied contract. If they do not, he will not be liable on any contract; but he will be for the fraud of the wife. I entertain no doubt of his liability on the same ground as he* would be liable for any other tort committed by his wife, [*78] to which he was not privy. If his wife had destroyed the tradesman's property by any act of violence, although this was done against his will, yet he would be liable, together with his wife, in an action of trespass *vi et armis*. So, if the tradesman be cheated out of his property by a wife, the husband is liable, together with the wife, in an action of trespass on the case.

For offences by the wife against the laws, where the punishment inflicted is nothing more than a fine, the husband is liable with the wife in all cases. Where the punishment inflicted is

(a) 1 Roll., 251; Levinz., 122; Cro. Car., 376.

(1) Hawk. P. C., b. 1, ch. 1, sec. 9; 3 Bl. Com., 414; 2 Kent's Com., 150

The words, that "*S. and his wife stole one thousand dollars in gold*," would not sustain an action by the wife with her husband, because they import a charge of stealing in his presence. *Baah v. Sommer and wife*, 20 Penn., 159.

imprisonment or corporal punishment, the wife alone is to be punished, unless she committed the offence in his company, or by his command. (1)

If the wife be liable to the penalty of a statute, the husband must be party to the action or information. A *femme covert* is within all statutes which provide a remedy for an actual wrong. (2)

A wife is fined for a riot, trespass, or other offence; such fine shall not be levied on the husband, unless she committed the offence by his coercion. (a)

The case of the wife, as respects her liability to punishment for crimes, is different from any other which exists in society. Children or servants are punishable for crimes which they commit in obedience to the command of their parents or masters, or by their coercion; but a wife is, in many cases, privileged from punishment, for offences against the laws of society; provided she commits the offence by the coercion of the husband. His command to commit the offence, is in law deemed coercion.

(c) 11 Rept., 68.

(1) It seems that, for any crime committed by the wife, without the coercion or not in the presence of her husband, she alone is punishable. H. P. C., 65; 4 Bl. Com., 29, 199. If she receive stolen goods by her own separate act, without the privity of her husband; or if he, knowing the facts, leave the house and forsake her company, she alone will be guilty as accessory, for the coercion which is supposed to be conveyed by the command or presence of her husband is only a presumption of law, and like all other presumptions may be repelled. Bac. Abr., tit. Baron and Femme, G, in *notis*. But she is not affected by receiving jointly with her husband another offender. 1 Hale, 48. For she cannot be admitted as a witness to discover, even collaterally, her husband's guilt. Stier v. Bowman, 13 Pet. Rep., 209. See also Martin v. The Commonwealth, 1 Mass. Rep., 391; Commonwealth v. Trimmer, id., 476; Commonwealth v. Neal, 10 id., 152; Rex v. Atkinson, Russell on Cri., 20; Rex v. Dicks, id., 16; Archer's case, 1 Ry. & Moo. C. Cas., 143.

In an indictment against a married woman for receiving stolen goods, held unnecessary to allege that the offence was not committed by the coercion of her husband. State v. Nelson, 29 Maine, 329.

(2) Hawk. P. C., 3. But in such case the husband may be prosecuted alone. Hasbrouck v. Weaver, 10 John. Rep., 256.

Husband and wife may be jointly indicted for a single act of retailing ardent spirits. Hamors v. Case, 8 Gratt., 698.

When it is committed by her in his company, if he joins in committing it, or also encourages, or in any way approves thereof, the law presumes that whatever the wife does is done by the husband's coercion. This is the law, not only as it respects inferior misdemeanors, but also capital * offences; provided their criminality arises in whole or in part from their [*74] being offences against civil society. On this ground it is, that she is not liable, if, by the coercion of her husband, she commits theft or even burglary. (1) To this rule there are two exceptions, viz., treason and the keeping of a brothel. The former is supposed to be an offence so dangerous to society, that even the coercion of a husband is no excuse. The latter is an offence of which the wife is supposed to have the principal management. When the offence is purely *malum in se*, and the crime would have been the same if men had never associated together in society, as in the case of murder; in such case the wife is liable, although she acts under the coercion of the husband. In all cases where she commits offences, not being under the coercion of her husband, she is as liable to punishment as any other person. When it is laid down that the husband, in view of the law, is the guilty person, if the wife commits an offence in his company, the law presuming that it was done by his coercion, it seems to me that the rule is too broad. The husband may show that the offence was committed against his will; for it surely would be absurd to punish the husband for what was done by his wife against his will. (2)

(1) She shall not be punished for committing a theft in the company of her husband. H. P. C., 65; *Martin v. The Commonwealth*, 1 Mass. Rep., 391; *Commonwealth v. Neal*, 10 id., 152. Nor be deemed accessory to a felony, for receiving her husband who has been guilty of it, as her husband shall be for receiving her. H. P. C., 65; 2 Hawk., 451. Nor liable on an indictment for disposing of forged notes. *Rex v. Atkinson*, Russ. on Cri., 16.

(2) This is most certainly the correct opinion, for it is well settled that the presumption of the coercion of the husband, like any other, may be repelled. 2 Kent's Com., 150; Bac. Abr., tit. Baron and Femme, G.

The wife may be indicted, convicted and punished in conjunction with the husband, if the presumption of coercion arising from the fact of his presence is rebutted. *State v. Parkerson*, 1 Strobbart, 169. The presumption of coercion, where the act is done in the presence of the husband, is only *prima facie*, and may

When an action is brought against husband and wife for a battery by them committed together, and both are found guilty, judgment must be arrested; for the wife, under such circumstances, could not commit a battery.

It is in general true, that the husband is compellable, during the coverture, to perform those duties which were incumbent on the wife to fulfill before marriage. As, when a man marries a widow, who has children whom she is able to maintain; in this case it has been, I apprehend, a received opinion in Connecticut, that the husband, by the marriage, becomes liable to maintain them. But if the widow whom he married was a pauper, having [*75] children * who were paupers, as there was no duty incumbent on this widow to maintain her own children, neither is there any duty on the husband to maintain them. See Blackstone's Com., 4th vol., 28.

In the case of *Tubbs v. Harrison*, 4 T. Rep., 118, it is holden, that a husband is not bound to maintain his wife's child by a former husband. Why should he not be obliged, during coverture, to fulfill this duty of his wife, as well as other duties? It seems to me that, if the wife were liable to maintain her child when sole, that it is a violation of the rule to hold that a husband is not obliged to fulfill those duties which, before marriage, she was bound to fulfill. To say that, in such a case, the husband is not bound to maintain them, is making an unnecessary exception to this rule. The mother is as much bound to maintain her child when the father is dead, as the father was when living, if the child has not property sufficient. (1)

be repelled. *Wagner v. Bill*, 19 Barb., 321. In crimes less than murder, the wife is presumed to act under the coercion of her husband, but the marriage must be clearly made out. *Davis v. State*, 15 Ohio, 72.

(1) Although this may seem to militate against the general principle, that a husband is liable to perform those duties incumbent on the wife before coverture, still the case of *Tubbs v. Harrison* may be taken as declaratory of the true doctrine of the common law. The case of *Rex v. Munden or Monday*, 1 Strange, 190, and Fort., 303, was recognized as of binding authority by Lord KENYON, in *Tubbs v. Harrison*. In the case of *Rex v. Bonier*, Id. Raym., 1454, decided in the King's Bench in 1726, an order upon the father-in-law, to maintain his daughter-in-law, was quashed on the authority of the case in Strange.

The same doctrine is also declared in a case decided in New York. *Elliott v.*

Sons-in-law are not obliged to maintain the pauper parents of their wives. This case is an exception to the rule; for, before marriage the wives were obliged by law (if they were of sufficient ability) to maintain their necessitous parents. (a) It is not very easy to discover the principle which governs this exception to the general rule. Perhaps it consists in an anxious desire to preserve domestic tranquillity, which might be endangered by the operation of the general rule.

In 4 T. R., 118, on a question whether the husband is bound to maintain his wife's child by a former husband, the broad proposition that he is not, seems to be recognized as law. It seems the court determined this case on the authority of the case in *Strange*, that a husband is not bound to maintain his wife's mother; and it is there said that the statute of Eliz., which provides that children should maintain their parents, extends only to natural relations. If this were the real ground on which the case * in *Strange* was determined, I should very much doubt the propriety of extending it to the case in question. [*76]

It is a general rule, that whatever duties are incumbent on the wife to perform before marriage, become the duties of the husband afterward to perform during coverture.

If case of the duty, created by this statute, of children maintaining their parents, it has always been held, that inability to maintain, for want of property, excuses the child. Of course, when a female marries, no duty is incumbent on her; and if the statute extends only to natural relations, the husband is not bound. But other duties before marriage, which were duties at common law, remain duties upon the wife after marriage, not-

(a) 1 Stra., 120.

Lewis, 3 Edwards' Rep., 40. It was there held that where a debt accrued in favor of the husband, against the children of his wife by a former marriage, for board and money paid, it would not be discharged by a mere declaration proved to have been made by him, that he did not intend to charge them, and that the court could order the amount to be paid directly to him, without its passing into the hands of an administrator, provided all the debts of the deceased father have been paid. But if he takes the children of his wife by a former marriage into his family, it is said by some authorities, that he stands in *loco parentis*, and will be liable on a contract made by her for their education and maintenance. *Stone v. Carr*, 2 Esp. Cas., 1; *Cooper v. Martin*, 4 East., 82.

withstanding the wife's inability, through want of property, to discharge them. This is the case with all the debts which she owed. So, too, her obligation to maintain an infant son is a duty at common law, unless he has property to maintain himself, or she herself is a pauper, neither of which appears to have been the fact. In this case, her obligation to maintain her infant son did not depend upon any statute; but, like all other duties, is incumbent upon her at common law, and passed to her husband on the marriage. If a female child's liability to maintain a parent be created only by statute; as, on her marriage, she becomes unable, the duty ceases: for inability in the case of maintenance, under the statute, excuses. But, if the liability to maintain be created by the laws of nature, the duty remains after she is married. In 1 Sid., 114, there is a case where A married B, who had a large personal estate. She died, and left a grandchild, a pauper. In this case it was resolved, that A must maintain this grandchild. This case is not analogous to the general law, that the husband is not obliged to fulfill the duties of the wife, after coverture is at an end.

[*77] *The statute of Eliz. provides, that parents shall support their children, and children their parents, when they become unable to support themselves. A question of construction arises on this statute, respecting which I have never heard of any decision. It is this: the pauper has a parent who is able to support him, and children who are able to support him. Are both parents and children bound in such case to contribute? As far as I have heard concerning the practice, it is this: that the children only contribute. I am of opinion that such a practice is correct. Children are under greater obligations to their parents than parents are to their children; and in most instances, children are becoming more and more able, and parents more unable, to discharge the duty of maintenance. Children owe their support, in infancy, to their parents; and when their parents are helpless, they are bound, in their turn, to administer to their wants. (1)

(1) Chancellor KENT treats the obligation of the child to support his parent as one resting entirely in statute provisions, and expressly says that the common law

We have seen that, when a wife commits an injury by the presumed coercion of the husband, she is not liable for that injury. So, too, if a wife have been compelled to commit an offence against the laws of society, by the coercion of the husband, (his command, or his presence with her, if he commits the same offence, being sufficient evidence of coercion,) she shall be privileged from punishment. This is true wherever the offence is *malum prohibitum*; and wherever it is an offence against property, however atrocious, even if a capital offence, as in cases of theft and burglary. (1)

It is worthy of remark, that such privilege is never extended to any other case but to that of a wife. If a servant commit a crime by coercion of his master, it does not furnish any excuse for his conduct to the demands of justice. This privilege does not extend to those offences which would have been crimes in a state of nature, independently * of civil society, as murder or the like. Coercion, also, is no plea in case of trea- [*78]
son. (2)

There is one case where the wife may be presumed to be under

makes none to enforce this plain obligation of the law of nature; and it has often been decided, that a moral duty, unsupported by some previous legal obligation, is not a sufficient consideration upon which to raise a promise, and, consequently, that the promise of a son to become responsible for past expenditures in the relief of an indigent parent, or *vice versa*, was not binding in law. *Mills v. Wyman*, 3 Pick. Rep., 207; *Cook v. Bradley*, 7 Conn. Rep., 57. This subject, however, will be more appropriately considered in treating of the relation of parent and child.

(1) See note 1, page 151, and cases there cited.

(2) Blackstone, on this point, treats the wife's exemption as only extending to those crimes which are *malum prohibitum*, and observes that no plea of coercion can excuse her in crimes that are *malum in se*, and prohibited by the law of nature, as murder and the like, not only because these are of a deeper dye, but also since, in a state of nature, no one is in subjection to another, it would be unreasonable to screen an offender from the punishment due to natural crimes, by the refinements and subordinations of civil society. And in treason, also, no presumption of the husband's coercion can extenuate the guilt of the wife, as well because of the odiousness and dangerous consequences of the crime itself, as because the husband, having broken through the most sacred tie of social community, by rebellion against the state, has no right to that obedience from his wife which he himself, as a subject, has forgot to pay.

the coercion of the husband, and yet be punishable; that is, where she, with him, keeps a brothel. (a) (1)

A wife cannot be made an accessory after the fact to felony, by any aid or comfort given to her husband; but if the wife procure her husband to commit a felony, she is an accessory before the fact. (b)

[79*]

*CHAPTER VI.

THOSE CONTRACTS ENTERED INTO BY THE WIFE, BY WHICH THE HUSBAND IS BOUND, AND NOT THE WIFE; HE BEING CONSIDERED IN LAW AS MAKING THOSE CONTRACTS THROUGH THE AGENCY OF HIS WIFE.

It is an indisputable rule, that the wife can act as attorney to her husband. Every contract, therefore, entered into by her, in pursuance of an express authority given to her by her husband, is binding upon him, it being his contract. In this case the principle is, that he consented to the contract, agreeably to the maxim that, whatever a man does through the agency of another, he does himself. (2)

(a) 1 Hawk., 2, 3; 1 Hale, 45, 47.

(b) 1 Hawk., 2, 3; 1 Hale, pp. 6, 45, 47; 4 Bl. Com., 23, 29.

(1) Black. Com., 29. For the reason, as Judge B. observes, that the law presumes such an offence to be generally conducted by the intrigues of the female sex.

(2) Bac. Abr., tit. Baron and Femme, J; *Ela v. Card*, 2 New Hampshire Rep., 176; *Tyree v. Williams*, 3 Bibb., 368. But where the husband and wife have a joint power to appoint the wife's estate by a formal deed, and they agree to sell it, the agreement is not binding on the woman. *Martin v. Mitchell*, 2 Jac. & Walk., 425.

The defendant's wife, as such, is not authorized to appear for him in a suit before a justice; but where she appears and pleads, employs counsel, amends the pleadings, and brings the defendant's children as witnesses, the justice is warranted in inferring authority. *Hughes v. Mulvey*, 1 Sandf. S. C., 92. She may sell and convey property of her husband, and the jury are to decide from the facts whether she was

He is also bound by such contracts of his wife, respecting those matters about which it has been usual for her to contract, and for him to ratify, on the same ground that he would be bound if his servant had contracted for him. His subsequent ratification of her contracts of that nature furnishes sufficient evidence that he had empowered her to make such kind of contracts. (a) (1)

(a) 1 *Sid.*, 123.

authorized to do so. *Jones v. Jones*, 3 *Strobhart*, 315. A mortgage of her husband's personal property, executed by the wife, in his presence and with his consent, is binding upon him. *Egerton v. Thomas*, 5 *Seld.* (9 *N. Y.*), 40; *Gates v. Brower*, *id.*, 205. To render a husband liable on a negotiable note indorsed by his wife, it must be shown that it was indorsed by his authority, expressed or implied. *Leeds v. Vail*, 15 *Penn.*, 185; *Sawyer v. Cutting*, 23 *N. H.*, 486; *Galusha v. Hitchcock*, 29 *Barb.*, 193. A married woman may, by an instrument duly acknowledged, appoint her husband her agent to dispose of her estate, real and personal. *Roseburgh's exec's v. Sterling's heirs*, 27 *Penn.*, 292. And where a married woman has a right to be heard, her husband may appear and act for her without a power of attorney. *Morris v. Garrison*, 27 *Penn.*, 226; *Mackley's estate*, 20 *Penn.*, 478.

Chapter 90, section 8, *Laws of New York*, 1860, provides that "no bargain or contract, made by any married woman, in respect to her sole and separate property, or any property which may hereafter come to her by descent, devise, bequest or gift of any person except her husband; no bargain or contract entered into by any married woman in or about the carrying on of any trade or business under the statutes of this State, shall be binding upon her husband, or render him or his property in any way liable therefor." See also *General Statutes of Massachusetts*, 1860, p. 538, sec. 5. *Revision of Iowa Laws*, 1860, section 2506, provides that contracts made by a married woman in relation to her separate property, or those purporting to bind herself only, shall not bind her husband. By the act of 22d February, 1718, of Pennsylvania, a married woman may become a *femme sole trader*. And the 2d section of the act of May 4, 1855, provides that, "whenever any husband, from drunkenness, profligacy or other cause, shall neglect or refuse to provide for his wife, or shall desert her, she shall have all the rights and privileges secured to a *femme sole trader* under the act of 22d February, 1718." *Dunlap's Sup.*, *Laws of Penn.*, 1854, 1856.

(1) *Bac. Abr.*, tit. *Baron and Femme*, H. Where a wife carried on business on her own account during the imprisonment of her husband, and he returned after his discharge to her, it was held that he was liable for articles furnished in the same business after his return, though the bills were made in the name of the wife. *Peters v. Anderson*, 3 *Bing.*, 170. So where the wife is accustomed to make any contracts, with the knowledge or consent of the husband, he will be bound by them. *Fenner v. Lewis*, 10 *John. Rep.*, 38. But the wife of an innkeeper, intrusted with the business of the inn, in the absence of the husband, cannot bind him to contracts

He is bound to fulfill the contract of his wife, when it is such a one as wives, according to the usage of the country, commonly make. If a wife should purchase at a merchant's store such articles as wives in her rank in life usually purchase, the husband ought to be bound; for it is a fair presumption that she was authorized so to do by her husband. (a) If, however, she were [*80] to purchase a ship * or yoke of oxen, no such presumption would arise, for wives do not usually purchase ships or oxen.

The husband is bound by every contract of the wife for any article purchased by her which comes to his use, and of which he voluntarily receives the benefit. It may be said, in this case, that his voluntarily taking the benefit of the purchase furnishes evidence that he authorized her to make the purchase. Whether it furnishes such evidence or not, there is another principle which will make him liable, independently of his consent. The law raises an implied promise of every man to do that which in justice he ought to do. It is not material whether he consents to be bound or not. Nay, if there be the most undeniable proof that he did not consent to be bound, yet he will be liable in an action of *indebitatus assumpsit*. As when a man, from the most unjustifiable motives, or the foulest fraud, obtains another's money, he is answerable in an action of *indebitatus assumpsit* for money had and received to the plaintiff's use. In this case the nature of the transaction precludes every idea of consent, unless we suppose that an unprincipled villain, at the moment in which he is wickedly depriving another of his money, honestly consents to restore it. The real ground of recovery in that case and many others is, not any real or supposed consent of the defendant, but because it was his duty to restore the money to the true owner; and this duty the law will enforce by an action of *assumpsit*. (1)

(a) 1 RoL., 360; 1 Sid., 120; Stran., 345.

with her lodgers at less than the ordinary rates. *Webster v. McGinnis*, 5 Binn., 235: see also *Spencer v. Tissue*, Add., 316, 319. And a contract made with the wife without authority, may be ratified by the husband so as to become his own. *Mulford v. Young*, 6 Ohio Rep., 294.

(1) In seeking for that point at which the husband's liability on the contracts of his wife for goods ceases, several circumstances are to be taken into consideration. 1. The standing of the parties in society as to wealth. 2. Whether the goods fur-

The husband is bound, sometimes, by the contracts of his wife, when he would not be bound if it were not for the peculiar circumstances of his family. If the husband go to foreign parts,

nished were necessaries. 3. Whether the articles furnished were such as the wife was accustomed to contract for with his consent, or whether he voluntarily received any benefit from the contract. In addition to this, it is sometimes necessary to consider the husband's willingness to furnish her with necessaries; for if he is sought to be charged on the ground of his misconduct, or refusal to furnish them, other circumstances must concur. What might be considered necessaries in one case, would not in another. *Montague v. Benedict*, 3 Barn. & Cress., is an instructive case on this subject. This was assumpsit for goods sold, in which it appeared that the plaintiff, a jeweller, in the course of two months delivered articles of jewelry to the wife of the defendant, to the value of £83. The defendant was a certificated special pleader, and lived in a furnished house, the rent of which was £200; he kept no man servant, and his wife's fortune upon her marriage was less than £4,000. She had, at the time of her marriage, jewelry suitable to her condition. And had never worn, in her husband's presence, any articles furnished her by the plaintiff. It further appeared that the plaintiff, when he went to the defendant's house to ask for payment, always inquired for the wife, and not for the defendant. In this case it was held that the goods so furnished were not necessaries, and that, in the absence of any proof of the husband's assent to the contract, the action could not be maintained. In support of the authority of *Montague v. Benedict*, see *Shelton v. Hoadley*, 15 Conn. Rep., 535. But if the husband permits his wife to assume a style and appearance in life above her real station, he is liable for necessaries suitable to such apparent condition. *Hunt v. De Blaquiére*, 5 Bing., 550.

By the act of 11th April, 1848, of Pennsylvania, sec. 8, *Dunlap's Laws of Pennsylvania*, page 1125, a judgment may be obtained against both husband and wife for necessaries for the family, and if no goods be found on an execution against the husband alone, an *alias execution* may be issued against the wife's separate property.

By the laws of Maine, a *femme covert* may carry on business on her own account, and no action can be sustained against the husband for goods and chattels furnished in the course of her business, even though a portion of the proceeds go towards the support of her husband and family. *Colby v. Lamson*, 39 Maine, 119; *Ornard v. Swanton*, 39 id., 125. But where the purchases and sales were made with his knowledge and consent, and he participates in the profits of the business, knowing them to be such, and that she professed to act for him, the jury may infer that the purchases were made on his credit. *Id.*

In Alabama and Iowa, the expenses of the family are chargeable upon the estates of both husband and wife: in Alabama either jointly or severally, and in Iowa upon the estates of the husband and wife jointly and of the husband severally. *Code of Alabama*, 1852, sec. 1987; *Revision of Iowa Laws*, 1860, sec. 2507.

In Mississippi, "all contracts made for necessaries for the family, wearing apparel for herself and her children, by the wife, or by the husband with her consent, shall

upon business, which detains him for years, there necessarily resides in the wife a more than ordinary power to bind the husband by her contracts in providing for his family and managing his domestic concerns. (1) The case would be the same when the husband * is incompetent to do business, by reason of sickness or becoming a lunatic; although a lunatic is not bound by his own express contract, yet, when his wife contracts for him, he is bound. Although there must of necessity be the absence of consent in him in such case, yet there can be no doubt of his liability. Justice requires the performance of such contracts; and, on that account, he ought to be chargeable.

The husband is bound by his wife's contracts for necessaries for herself, when he refuses to provide them. This rests wholly on the ground of its being a duty in him to provide necessaries for his wife, which the law will enforce. His consent is not necessary, and it can never be presumed in the case where he refuses to provide them for her. (a) If he should turn her out of doors, and forbid all mankind from supplying her with necessaries, yet he would be bound to fulfill her contracts for necessaries. The case is the same if she depart from her husband with reasonable cause, and refuse to cohabit with him. If she depart without reasonable cause, he is not liable on her contracts for necessaries, unless he refuse to receive her into his house again, and there maintain her. (b) By this it is not to be under-

(a) 1 Salk., 118; *Strange*, 1214.

(b) *Str.*, 275.

be binding upon her separate property. Revised Code of Laws of Mississippi, 1857, art. 25. In Texas, the common property is liable for necessaries. Act of 1848, Digest of Laws of Texas, art. 1395, page 313. In California, a married woman, who carries on business on her own account under the statute, is responsible for the maintenance of her children. Act of April 12, 1852; Wood's California Digest, page 489, sec. 4, art. 2627.

(1) Where a man deserted his wife and family, leaving her keeping a boarding-house, without any other means of support, and did not return to them, or make any provision for them, and the wife continued the business, and conducted it in a reasonable and proper manner, to obtain the means of support, it was held that the husband was liable for her contracts made in the course of such business. *Rotch v. Miles*, 2 Conn. Rep., 638. But in *Benjamin v. Benjamin*, 15 id., 347, it is said that, whether the husband be abroad or at home, the wife is not presumed to be his agent generally, or to be entrusted with any other authority as to his affairs than that which is usual and customary to confer upon the wife.

stood that he is obliged, when he receives her, to suffer her to assume the prerogatives of a wife. He may refuse her his bed, and prohibit her from sitting at his table, or managing the concerns of his family. The rule is this: He must maintain his wife with necessaries, according to his rank in life, as long as she cohabits with him; and when she does not, if she have sufficient reason for refusing so to do; but if she depart without cause, he is not chargeable with her contracts for maintenance. (1)

(1) *Harris v. Morris*, 4 Esp. Cas., 41; *McCutchen v. McGahay*, 11 John. Rep., 281; *McGahay v. Williams*, 12 id., 293. And if the wife's situation is rendered unsafe by his cruelty and ill treatment, it is equivalent to turning her out of doors. 3 Esp. Cas., 251; *Boulton v. Prentice*, 1 Sel. N. P., 264; 2 Stark., 87. But no ill treatment short of personal violence is sufficient. *Harwood v. Heffer*, 3 Taunt., 420. If the jury decide that the wife had reasonable ground to apprehend personal violence, the husband is liable. *Houleston v. Smith*, 3 Bing., 27 (where the case in Taunton is disapproved of by the court); and if the wife were justified in leaving him, he cannot determine his liability by merely requesting her to return. *Emery v. Emery*, 1 Young & J., 501.

A wife, who is wrongfully turned out of doors by her husband, carries with her an implied credit and authority to charge her husband for necessaries. *Billing v. Picher*, 7 B. Monr., 768. Where a wife leaves her husband's house in consequence of his adultery, and lives apart from him, she is entitled to her support from him. *Sykes v. Halsted*, 1 Sandf. S. C. R., 483. Held, that a wife, who has, voluntarily and without good reason, for a considerable time lived apart from her husband, and has supported herself without his assistance, may, if her husband does not previously claim her earnings, receive them herself, and the husband cannot recover them of the person from whom they were due. *Norcross v. Rogers*, 3 Vt., 588.

But if the wife departs from her husband without cause and without his consent, he will not be chargeable. The leading case on this point is *Manby v. Scott*, 1 Mod. Rep., 128. It was there held that, if the wife departs from her husband without his consent, and during her absence her husband prohibits several persons, and, among others, J. S., to trust her; and she afterwards makes a request to return and cohabit with him, but he refuses to receive her, and J. S. sells her articles to a considerable amount, which are found suitable to the degree of her husband, that he was not chargeable. The case was thoroughly argued and examined in the exchequer chamber, and determined as above by eight judges against three. This case has since been often recognized as authority, and may now be considered good law. Where there was no special prohibition, and she offered to return, the husband was adjudged to be liable. 11 John. Rep., 281; 12 id., 293; and this though the offer was made through the medium of a third person, if the authority of such person be not questioned. 12 John. Rep., 293. Nor does the institution of a libel for a divorce by her alter his liability. *Cunningham v. Irwin*, 7 Serg. & Rawle, 447.

Those who trust a wife, who has separated from her husband, do it at their peril.

If a husband turn away his wife, or treat her with such cruelty that she is obliged to leave him, he is not only bound at law by her contracts for necessaries, but *chancery will, on her [*82] application, or that of a Prochein Ami, decree her a separate maintenance, suitable to her degree and quality. The fortune which she brought to her husband, and his circumstances, will be taken into consideration in settling what the sum allowed shall be. After such decree, if the husband offer to be reconciled, the court will suspend the payment of the money to the wife, and order the money to be brought into court, with liberty for the wife to apply for the same, if the husband continue his ill usage. 1st Ch. Cas., 250. (a) (1)

It is the duty of the husband to maintain the wife; and her ability to support herself from her separate property does not discharge him from this duty, unless this separate property be settled on her for her separate maintenance. (b) A wife had a pension from the crown for £300, payable annually to the wife, as her separate property, determinable at the pleasure of the crown. She had spent some time at Bristol, necessarily, for her health, and expenses were thereby incurred. On the return of the wife, the husband shut his doors against her, and refused to pay the expenses so incurred at Bristol. Thomson, the person who furnished lodgings and necessaries for the wife, brought his action against the husband and recovered. There was no agreement to live separate, nor was there any separate maintenance,

(a) Cary, 124; 1st Ch. Rep., 4, 184; 2d Ver., 408, 671, 722.

(b) Barr., 2177.

They must look to the grounds of their separation. *Billing v. Pilcher*, 7 B. Mour., 458; *Gill v. Read*, 5 R. L., 343; *Reese v. Chilton*, 26 Mis., 598. If the husband and wife part by consent, and he secures to her a separate maintenance suitable to his circumstances and condition in life, and pays it according to agreement, he is not answerable even for necessaries. *Calkins v. Long*, 22 Barb., 97. No action can be maintained against the husband for the support of his wife as a pauper in the county poor-house. *Commissioners, &c., v. Hildebrand*, 1 Carter (Ind.), 555. Nor can she be a pauper, if her husband is able to support her. *Norton v. Barber*, 18 Barb., 106. For the contrary, see *Monson v. Williams*, 6 Gray (Mass.), 416. A husband, though a minor, is liable for necessaries for his wife. *Cantine v. Phillips*, 5 Harring (Del.), 428; *Cole v. Seeley and wife*, 25 Vt., 220.

(1) See note 1, page 65, and cases there cited.

as a fund furnished by the husband to pay her debts. Although the wife possessed abundantly the means of paying these expenses, yet these means were her separate property, which ought not to be expended in fulfillment of a duty which belonged to the husband to perform, that of maintaining her. (1)

If a wife elope with an adulterer, the husband is not liable to maintain her, although she be willing to return. (2) It is said that, when she elopes with an adulterer, and contracts for necessities, that he is not chargeable, although * the plaintiff [83] had not notice of such elopement. This principle seems to be liable to strong objections. It is not analogous to the case of a servant who has been in the habit of purchasing articles for

(1) But in an action against a husband for goods supplied to his wife, living apart from him, the plaintiff must adduce some evidence of the circumstances of the separation to show that the wife had authority to bind her husband for necessities. *Edwards v. Towels*, 6 Scott N. R., 641. Where husband and wife live separate, without the fault of the wife, who has property under her control, if this is adequate to her support, the husband cannot be charged by her contracts. *Cunningham v. Irwin*, 7 Serg. & Rawle, 247; *Lockwood v. Thomas*, 12 John R., 248; *Clifford v. Layton*, 1 Moo. & M., 101; *Hodgkinson v. Fletcher*, 4 Camp. Rep., 70; *Ozard v. Darnford*, 1 Sel. N. P., 261; *Turner v. Winter*, id. Where a party is expressly forbid to furnish the wife, in order to make the husband liable, he must prove that the husband did not supply her with necessities suitable to her condition. *Mott v. Comstock*, 8 Wend., 544; and see *Baker v. Barney*, 8 John. Rep.; *Fenner v. Lewis*, 10 id., 38.

The duty of maintaining the wife devolves upon the husband, although she have a dower estate by virtue of a previous marriage. *Neil v. Johnson*, 11 Ala., 615.

If a husband by his severity drive his wife from his house, she not having been guilty of adultery, he will be liable for her necessities. *Clement v. Mattison*, 3 Rich., 93; *Shelton v. Pendleton*, 18 Conn., 417; *Evans v. Fisher*, 5 Gilm. (Ind.), 569; *Kemp v. Downham*, 5 Harring (Del.), 417. A husband held not liable for services rendered to his wife by a counsellor-at-law in successfully defending her against a libel for divorce, filed against her by her husband. *Coffin v. Dunham*, 8 Cush., 404. If a wife, who is plaintiff in an action for divorce, discontinues the suit or is defeated in it, and judgment is rendered against her, her husband is not liable to her attorney for costs incurred by her therein. *Phillips v. Simmons*, 11 Abb. Pr. R., 287, and cases there cited. In the case of *Swett v. Penrice*, 24 Miss., 416, it was held that, if a wife trade, not as her husband's agent, but in her own right, and in reference to her separate estate, credit being given to her and not to her husband, he is not liable on such contracts.

(2) *Govier v. Hancock*, 6 Term Rep., 603; *Harris v. Morris*, 4 Esp. Cas., 41; see also *Rex v. Flintam*, 1 Barn. & Adol., 227

his master, by his authority. (a) In that case, although the relation of master and servant is dissolved, if the servant purchases articles, under the pretence that they were bought for his master, the master is chargeable, unless the seller, knew of the dissolution of the connection, or unless it had become a matter of such notoriety that notice might be fairly presumed. The reason surely is as strong why the husband should be charged, in case of elopement of his wife with an adulterer, unless the plaintiff had notice, or unless it had become a matter of notoriety. If a wife, who is an adulteress, lives with her husband, he is as liable for her contracts as for those of a chaste wife.

There is a case in *Bosanquet & Puller*, page 226, which seems to establish the opinion, that, if a man has a wife, living in a state of adultery, and he separates himself from her on that account, leaving with her the children born in wedlock, in a house belonging to him, from which he removes, and she continues after this separation in the practice of adultery, the husband's liability for her contracts for necessaries depends on the knowledge of the person (who furnishes the necessaries) of the manner of her living. If he knew in what manner she lived in her husband's house, the husband would not be bound; if he did not know, he would be bound. When a husband is out of the country, and the wife dies, and a third person is at the expense of her funeral, he shall recover of the husband, although the husband never requested him to expend anything on that account, nor assented to it after the expense incurred. It was the legal duty of the husband to be at such expense. It was a matter of decency and necessity that such expense should be incurred [*84] by some person. The rule of damages would be the money expended, if it did not exceed what was suitable, according to the custom of the country, for a person of the rank and fortune of the husband. 1 Hen. Bl., 90.

In 6 Mod., 171, there is an authority to show, that if a woman, who elopes with an adulterer, and has thereby forfeited her dower, be received again by her husband, she shall have dower, and he is liable for her contracts for necessaries. (1)

(a) *Str.*, 647; *Id.*, 706; 6 T. R., 608.

(1) *Ante*, page 107, note 3.

When the wife does not cohabit with the husband, they having separated by mutual agreement, and the wife has a separate allowance; if this separation be a matter of notoriety, the husband is not chargeable for her contracts, although made for necessities. (a) When there is a separation by agreement, and the wife, by her labor, earns a livelihood, the husband is not chargeable. (1)

The husband, notwithstanding his liability to discharge the contracts of a wife for necessities, as long as she cohabits with him, may forbid a particular person from trusting her: this may be reasonable, to prevent her from running him into debt, as it might be, to his bitterest enemy: but if his particular prohibition should become so extensive as to render it impossible or even difficult to procure necessities from any person who has not been forbidden to trust her, such prohibition would be of no avail. (b) (2)

It is said, in some authorities, that, if a wife buys necessities, and sells or pawns them before using, the husband is not chargeable. If the only ground, on which a husband could be liable for the contracts of the wife, were, that the articles purchased came to his use, such a position would be correct. (3) But the husband may be liable on the ground of permitting his wife generally to purchase necessities for herself. He may also be liable on the ground of general usage for a wife to purchase

(a) 1 Salk., 116; 4 Burr., 2177; Salk., 118.

(b) 6 Mod., 171; 2 Show., 283.

(1) In these cases the law presumes the credit to be given to the wife upon the strength of her separate estate. *Baker v. Barney*, 8 John. Rep., 72; *Fenner v. Lewis*, 10 id., 38; *Mott v. Comstock*, 8 Wend., 544; *Ld. Raym.*, 444.

(2) *Manby v. Scott*, reported at length in *Bac. Abr.*, tit. *Baron and Femme*. But warning to a tradesman's servant is not sufficient warning to his master not to trust her. Salk., 118; *Ld. Raym.*, 1006. In all these cases, however, if the tradesman is able to show that the husband absolutely refused to provide necessities for his wife, he may be made chargeable.

(3) The authority in *Salkeld*, evidently the one referred to in the text, is only to this effect, that if the wife takes up goods and pawns them before they are made into clothes, the husband shall not pay for them, because they never came to his use; but it is otherwise, if they are made up and then pawned. So if she pawns her clothes and borrows money to redeem them, the lender will not be entitled to collect the money of the husband. 2 Show., 283.

[*85] such * necessities as she sold or pawned. I therefore very much doubt the soundness of the position before mentioned. The husband might become liable, at the time of the contract, on one or both of the grounds just mentioned; and no subsequent improper conduct of the wife ought to discharge him. If, indeed, the vendor knew, at the time of the sale, that the articles were purchased with a view to sell or pawn, then it would be reasonable that the husband should not be charged; without such knowledge in the vendor, it seems inconsistent with sound principles to say, that the husband is not liable on such contracts.

If a wife, without special authority, should attempt to bind her husband by a deed in his own name, the deed would be void. This is true, although it was in a case and for articles respecting which he would be liable to fulfill her contracts; for a wife cannot bind her husband by deed. The husband, however, would be liable, the deed notwithstanding, on the *assumpsit*, which the law raises in such cases. (a)

Although the husband is bound by the contracts of the wife for necessities; (b) yet a contract for money, loaned for the purpose of being laid out in necessities, and actually so laid out, will not at law bind the husband, although in equity it is considered as obligatory upon him. There can be no reason given, why, in such a case, both courts should not have the same rule. (c) (1) If the rule of law be founded in reason, it is proper that it should be the rule in equity; if it be not, the courts of law ought to adopt the rule as it is in equity.

If the wife be committed to prison for a crime, it seems the husband is not bound to pay for necessities furnished for her. (d)

(a) 6 T. Rep., 176.

(b) Salk., 387; 3 P. W.

(c) Hut., 106: cases on the foregoing subjects.

(d) 1 Mod., 138; 2 Vend., 155; 1 Lev., 445; 1 Ld. Raym., 1000; 2 Law., 16; Stran., 1122.

(1) But there is this distinction, for which, in addition to the cases cited in the text, see 1 Salk., 387; Prec. in Chan., 502; 1 P. Wms., 482.

*CHAPTER VII.

[*86]

DEBTS DUE AND OWING FROM THE HUSBAND TO THE WIFE AT THE TIME OF MARRIAGE: DEBTS WHICH BECOME DUE DURING THE COVERTURE: DEBTS WHICH ARE NOT TO BE PAID UNTIL AFTER THE HUSBAND'S DEATH: HIS CONVEYANCES OF REAL PROPERTY BEFORE MARRIAGE: HIS CONVEYANCES TO HER AFTER COVERTURE: ARTICLES OF AGREEMENT BETWIXT HUSBAND AND WIFE TO LIVE SEPARATELY.

By the marriage, all debts due from husband to wife, which may become due during the coverture, are annulled. These, like all other choses, are at the disposal of the husband; and, by the marriage, they are reduced to such possession of the husband as they are capable of. A question has been made, whether such a debt, the evidence of which remains entire after the husband's death, does not survive to the wife against the husband's executor. (a) For example, a note of hand, given by the husband to the wife before marriage, is found entire after the husband's death. This question must have arisen from a supposition that the husband had not reduced it to possession. I apprehend, however, that no such conclusion can be drawn from such a state of facts. It will not be contended, if a note, given by him to any other person, should be found in his possession entire, that this would furnish the smallest evidence that such a note remained an existing debt against his executor.

Contracts by the husband with the wife, previous to marriage, containing duties not to be performed until after* the dissolution of the coverture, which were entered into with a view of providing for the wife, or his issue by her, are binding upon him, both in law and equity; as, for example, all covenants to make suitable and specific settlements in consideration of marriage to be had betwixt them. It is not material whether the contract provides for settling real or personal property; nor is it material in what shape such contract appears. (1)

(a) Cro. Car., 651.

(1) Wherever the agreement is fair, and in accordance with the spirit and policy of the law, equity will always enforce its specific performance. 10 Serg. & Rawls,

If the husband, before marriage, execute to the wife a bond, to become due on his death, such bond is good against the husband; and the wife is considered as much in the light of a creditor as any other person. It was never denied that such a bond amounted to an agreement of the husband with the wife, at his death to give out of his estate to her the sum contained in the bond, which might be decreed in chancery to be executed. This has frequently been done under an apprehension that such bond was in law annulled by the marriage, and no longer remained a valid instrument, capable of being enforced in a court of law. There was, however, no necessity of resorting to a court of equity, in such a case. (a) In the case of *Smith and Stafford, Hobert*, 216, and *Cage and Acton, Ld. Raymond*, 515, it was determined that a bond given to a woman, in contemplation of marriage, to become payable to her on the death of the obligor, her husband, was binding at law upon the executor of the husband. As these judgments were rendered by a divided court, it seems, however, to have remained a question, for a long time, whether those cases were law.

It was always admitted, that such a bond was good evidence of an agreement which chancery would execute. The practice of resorting to chancery, in most cases of this kind, and the decrees of chancellors, seemed to corroborate the opinion that such bond was released at law (b) by the marriage, as contended [*88] by Lord HOLT, in the *case of *Cage v. Acton*, with all the force that could grow out of technical reasoning. This question is now put at rest by the unanimous decision of

(a) *Comyn's Rep.*, 67; *Carth.*, 512.

(b) 2 *Ver.*, 430.

447. In *Pulvertoft v. Pulvertoft*, 18 *Ves.*, 92, it was held that equity would compel a specific performance of an ante-nuptial agreement, at the request of any person coming within the influence of the marriage consideration in favor of collateral relations, and all who rest their claims upon a valuable consideration. See also *Bradish v. Gibbs*, 3 *John. Ch. Rep.*, 550. An ante-nuptial contract, founded on a valuable consideration, such as marriage, cannot be affected by fraud in the settler, provided the other party is innocent. *Magniac v. Thompson*, 1 *Pet. U. S. Rep.*, 348. In North Carolina and Tennessee, these settlements must be registered in order to make them binding upon the property of the settler, as against his subsequent creditors. 2 *Dev. & Batt.*, 391; *Stat. of Tenn.*, 1831.

the court. 5 Term Reports, 381. In that case it was determined that a recovery might be had in a court of law, on such bond, against the husband's executor. Although it is now settled, that a bond, given by the husband to his intended wife, to be paid to her by his executors, after his death, is not avoided by the marriage, but is recoverable at law; yet a bond given to her, the condition of which was to make a settlement on her, is avoided by the marriage, and cannot be sued at law. In chancery, however, such a bond is sufficient evidence of an agreement to make a settlement, and will be specifically enforced. In both cases the contract is binding. In the former, the intention of the parties could be carried into execution, by such a judgment as a court of law could render. In the latter, the intention of the parties could not be carried into execution, otherwise than by a specific performance, which could be decreed only by a court of chancery. (1)

The husband, before marriage, made provision for his wife, by an instrument in writing, allowing to her a certain sum of money, to be paid to her by his executors, after his death; and she, during coverture, by writing, releases his executor from the payment: such release is not valid. Brown, 15.

A husband gave a bond before marriage, to leave his intended wife a certain sum, if she survived him. It was decreed in chancery to be paid before other debts. Where the husband gave to his intended wife a bond for the payment of a sum of money, in case she survived him, and afterwards became a bankrupt, the chancellor refused to stop anything by way of dividend out of

(1) The case of *Melbourne v. Ewart et al.*, 5 Term Rep., 381, is very strong to the point that the bond is not released by the marriage of the parties, where it was intended for the benefit of the wife if she should survive. Lord KENYON, in that case, observed, that he readily acceded to the general proposition that a person, by marrying his creditor, releases the debts of his wife, but lamented that Lord HOLZ should, in 1 *Ld. Raymond*, 515, have had recourse to such flimsy and technical arguments to enforce a case so directly against law and conscience, as that a man could not bind his property in favor of his wife, and could not make it liable to the payment of a bond executed before marriage. No case is probably to be found in the modern decisions of sufficient authority to overthrow the reasoning of Lord KENYON in this case, and its doctrine may now be relied on as good law.

the bankrupt's estate, to answer this contingent demand when it should happen. In the case of a bottomry bond* (which, [*89] when made, was a contingent demand, for its payment depended upon the safe return of the ship), where the ship returned safe before the dividend was made, the obligee in the bond was let into a share of the dividend. March, 1728: *Chawell v. Cassoneta*.

When separate property has been provided for the wife, by articles previous to marriage, if such wife elope from her husband, and even live in a state of adultery, yet, upon a bill in chancery by the wife for a specific performance, it will be decreed against the husband. (a)

When a contract is executed betwixt husband and wife, before marriage, of *personal property*, being a gift by the husband to the wife, such property, on marriage, belongs to the husband. (1)

(a) 3 P. Wms., 308.

(1) But there are some instances in which personal property may become vested as a gift in the wife by operation of law. As where a husband takes a joint obligation to himself and wife for a debt due to himself alone, it is a gift to the wife, who takes as a joint purchaser, and by survivorship, and in her own right, unless the proceeds should be wanted on a deficiency of assets for the payment of creditors. *Gibson v. Todd*, 1 Rawle, 455.

Courts of equity will uphold gifts from a husband to his wife *after marriage*, though such gifts are ordinarily void at law; and the gift will, as against the husband and his administrator, but not as against his creditors existing at the time of the gift, vest in the wife an unimpeachable right of property, which may be treated as her exclusive and separate estate. *George v. Spencer*, 2 Md. Ch. Dec., 353; *Mews v. Mews*, 21 Eng. L. & Eq., 556; *Deming v. Williams*, 26 Conn., 226; *Wells v. Treadwell*, 28 Miss. (6 Cush.), 717; *Lehr v. Beaver*, 8 Watts & Serg., 106. And it was held, in Herr's appeal, in Pennsylvania, 6 Law Rep., 408, that when the husband was in the habit of giving to his wife the specie that came to him in the course of his business, until it amounted to \$4,500, it became the property of the wife as against the heirs-at-law, and in the nature of a provision for her; and this gift and contract, made after marriage, and without the intervention of trustees, was enforced against his estate. See, also, *Barron v. Barron*, 24 Vt., 399; *Searing v. Searing*, 9 Paige, 284. Held, also, in Texas, that a husband may settle his property on his wife and family, when he can do so without impairing the rights of existing creditors. *Reynolds v. Lansford*, 16 Texas, 286. And, in Maine, that a husband may transfer his creditor's promissory note to his wife, unless it be done for an inadequate consideration, and with intent to defraud existing creditors. *Motley v. Sawyer*, 38 Maine, 68. Held, that, in spite of the act of 1843, a *femme covert*

A gift, therefore, by the intended husband to the wife would be perfectly idle, unless it was so given as to belong to her for her sole and separate use. A conveyance by him of real property to his intended wife, whether in the form of an ordinary conveyance or a marriage settlement, is as binding on him, after marriage, as any deed executed by him to any other person. It is a maxim of the common law, that the husband and wife cannot contract with each other during the coverture. The reason assigned is, that they are one person in the eye of the law, and that it would be absurd for any person to contract with himself. The maxim is generally correct, that a husband and wife cannot contract with each other; but the reason assigned has no foundation in truth. The law does not view the husband and wife as one person; for a deed or devise of land to a wife vests in her, and not in the husband. As to real property, then, they are two distinct persons. So, too, on the death of some ancestor or kindred, real property may descend to her in fee; and, to this inheritance, the husband has no title, except to the usufruct, during the coverture, and to curtesy afterwards. In obedience to this maxim, it * seems to have been a rule of the common law that the husband and wife could not convey their lands [*90] to each other. That the wife's conveyance of her real property should not be binding on her, is founded in reasons which are in no measure dependent on the idea that the husband and wife are one person. (a) The wife ought not to be bound by her contracts with the husband, whilst under his coercion. Those reasons obviously do not exist in the case of the conveyance of real property by the husband to the wife. I apprehend that, in this case, the influence of the before-mentioned maxim is extended beyond the limits which ought to be assigned to it.

A, the husband of B, cannot convey real property to B. Yet if A conveys to C, a third person, who, by agreement, imme-

(a) *Co. Litt.*, 112; *id.*, 187.

has a right to make a gift to her husband of the use and income of her separate estate, and, consequently, his creditors may attach such income or other property for which it has been exchanged. *Gage v. Dauchy*, 28 Barb., 622. Acquiescence on the part of the wife in the husband's receipt of the profits of her estate, will be equivalent to a gift. *Id.*

diately conveys to B, A does in fact convey to B through C, who is only a conduit pipe, through which the title is conveyed to B. Can any good reason be assigned why A should not convey directly to B, instead of pursuing such a circuitous route? If the object of the law were to prevent husbands from conveying their real property to their wives, such circuitous conveyance would be void. It would be a fraud upon the law: it would be attempting to do that indirectly which by law cannot be done directly. It would be an evasion of principle which the law would not endure. It is acknowledged that such a conveyance by A to C, and then by C to B, would be valid. It is clear that such mode of conveyance answers no purpose except to preserve entire, without infringement, a maxim in preserving which there is no conceivable utility. (1)

(1) Such is the method of conveyance between husband and wife in constant use in Vermont. Such conveyance from the husband would undoubtedly be void as against his creditors at the time of the conveyance, but for debts accruing subsequently the estate conveyed would not be holden. But where the conveyance after marriage is made in pursuance of an ante-nuptial agreement, the conveyance is good both against subsequent purchasers and creditors, for in such case the marriage is held to be a valuable consideration to support it. Such is the doctrine of *Reade v. Livingston*, 3 John. Ch. Rep., 550; though a voluntary settlement, without such previous agreement, was held to be void as against creditors existing at the time the contract was made, but if the husband was not indebted at the time of the conveyance, it was good against subsequent creditors. *Thompson v. Dougherty*, 13 Serg. & Rawle, also supports the doctrine, and it has received the assent of the Supreme Court of the United States, in *Sexton v. Wheaton*, 8 Wheat., 229.

And it is no objection to the validity of a deed by the husband and wife to a third person that its object is declared by recital to be to vest the fee simple in the husband by an immediate reconveyance to him. *Lunch v. Livingston*, 6 N. Y. (2 Seld.), 422; *Shepperson v. Shepperson*, 2 Gratt., 501; *Abbott v. Hurd*, 1 Blackf., 510. Although a conveyance by the husband to his wife is void in law, yet it will be upheld in equity where it will prevent injustice. *Simmons v. McElwain*, 26 Barb., 419. To avoid a conveyance by a husband to his wife, it is not necessary that the debtor (the husband) should be insolvent, or believe himself insolvent, at the time of the conveyance. It is sufficient if he is indebted, and that insolvency would be the inevitable or probable result of want of success in the business in which he was engaged. *Carpenter v. Roe*, 10 N. Y. (6 Sel.), 227. Under the statute of Maine of 1847, the husband may convey land directly to the wife, if his creditors would not be thereby defrauded. *Davis v. Herriek*, 37 Maine, 397; *Johnson v. Stillings*, 35 id., 427. It is a disputed question in New York whether the

Since the statute of uses, A can convey to B without the intervention of a deed to B from a third person: as, if A should convey to C for the use of B, the statute immediately attaches itself to such conveyance, and vests the title in the *cestuy que use*. (a) In Connecticut*, where we have no statute of uses, the common-law circuitous mode is in constant use. (b) [*91]

Although it is a general rule that a contract made betwixt a man and his wife is not valid, yet there are sundry instances in which the husband having permitted the wife to take the benefit of the sale of certain articles, and she having gotten the avails of the articles sold, equity has considered such property as the separate property of the wife. There is a remarkable case of this kind in 3 P. Wms., 337. The wife had, with the leave of the husband, sold for her own benefit, butter, poultry, and similar articles; and, in this way, had collected a hundred pounds. This money the husband afterwards borrowed of the wife, and died. It was holden that the executor of the husband should pay it from the husband's estate; there being no deficiency of assets to pay creditors. (c) A wife agreed with her husband to sell her lands, and the husband agreed with the wife that part of the

(a) Co. Litt., 112.
(c) 2 Ver., 63.

(b) 3 Rol. Abr., 788; Plowd., 711; Dyer, 106.

wife may, under the acts of 1848 and 1849, convey land directly to her husband. The act of 1849, amending that of 1848, provides that "any married female may take by inheritance, or by gift, grant, devise or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise real and personal property, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with the like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband, nor be liable for his debts." Held, that this act restricts the wife from taking, as therein provided, from her husband, but that her power of disposing of her estate is general, and she may convey and devise to any one in the same manner as if she were unmarried. *Winans v. Peebles*, 31 Barb., 371; decision affirmed at general term. Held, *contra*, at Broome general term, *White v. Wager*, 32 Barb., 250 (CAMPBELL, J., dissenting). By the act of 1860, ch. 90, of New York, the wife may bargain, sell and convey her real property, and make any contract in respect to it; but such conveyance or contract is not valid without the assent of her husband, except in case of his unreasonable refusal of such assent, or his disability, in either of which cases she may obtain the consent of the county court to convey her real estate without her husband's assent.

purchase-money should be the wife's separate property. She accordingly levied a fine of her land, and such part of the purchase-money as was agreed was put into the hands of trustees for her benefit. It was decreed in chancery that this money should not be liable for the husband's debts. A voluntary promise from the husband to the wife, being only executory, has never been decreed in chancery to be performed.

Articles of agreement entered into between husband and wife, to live separately, are recognized both in the courts of law and equity. The parties are bound by all the legal covenants entered into; and those marital rights which the husband in such articles renounces, he can never resume. (1) If he covenant to allow the

(1) The question, whether an agreement made between husband and wife, during coverture, to live separately, is valid in law, has been a subject of much discussion in the English courts of law and chancery. It was formerly held that such an agreement was void, and so Lord ELDON intimated in the case of *St. John v. St. John*, 11 Ves., 530. His lordship placed it upon the ground that it was against the policy of the law, and consequently void, inasmuch as such settlements, creating a separate maintenance, by a mere voluntary agreement, between husband and wife, were in their consequences destructive to the indissoluble nature of the marriage contract; and treated it as one of the most serious questions that could be discussed in a court of justice. In *Worrall v. Jacob*, 3 Merrivale's Rep., 256, it was considered as settled that chancery would not carry into execution such articles between husband and wife, though it was admitted that an engagement between the husband and a third person, as a trustee, though originating out of, and having reference to, a separation, were valid, and would so be considered in chancery. The reason of this decision was said to be, that if such agreements were enforced it would give the parties power to alter the duties growing out of, and the effect of the marriage contract, and to effect, at their pleasure, a partial dissolution of it. There seems to be no reason why the mere introduction of a trustee should be sufficient to enforce the agreement in chancery. It certainly makes no difference with the effect of the contract. If, as having a tendency to the dissolution of the marriage contract, it is against the policy of the law in the one case, it most clearly is in the other. It is not now necessary to seek for the reason of this anomaly, for the balance of authorities, both in England and the United States, is in favor of sustaining such an agreement with or without a trustee. *Carson v. Murray*, 3 Paige Ch. Rep., 483; *Reed v. Beazeley*, 1 Blackford's Indiana Reports, 97 (see the high compliment to the authority of the latter case, in note, 2 Kent Com., 176); *Ross v. Willoughby*, 10 Price Rep., 2; 2 Raithby's Vernon, 386, in note; *Rodney v. Chambers*, 2 East., 383; *Cooke v. Wiggins*, 10 Ves., 191. But the introduction of the fiction of a trustee places the agreement valid both in law and chancery. 2 Kent

wife a separate maintenance, he will be compelled in equity to fulfill such covenant. If he covenant to live separately, he forever renounces his marital rights to her person. Of course, *she is entitled to all acquisitions of property which may [*92] arise from her personal services. He can never recover anything of the man who should take away his wife so separated, or maintain a suit against any man for criminal conversation with her. (1) He has no right to her person; and, of course, receives from such a transaction no greater injury than any other member of the community.

If he should attempt to seize upon the person of the wife, the

Com., 177: *vide*, also, *Nurse v. Craig*, 5 Bos. & Pul., 149; *Hindley v. Westmeath*, 6 Barn. & Cress., 100; *Shelthar v. Gregory*, 2 Wend., 422.

The course of decisions upon the effect of such agreements has been very uniform in the United States. *Randall v. Murgatroyd*, 4 Dall. Rep., 304, 307; *Browning v. Coppage*, 3 Bibb, 37; *Croftwaight v. Hukinson*, 2 id., 407; *Magniac v. Thompson*, 1 Baldwin's C. C. U. S. Rep., 344; *Scott v. Loraine*, 6 Munf., 117; *Bray v. Dudgeon*, id., 132; *Tyson v. Tyson*, 2 Hawks. Rep., 472. But in Connecticut, the decisions are different, and seem rather to follow the course pointed out by Lord ELMON, in *St. John v. St. John*. In *Debble v. Hutton*, 1 Day's Rep.; 221, it was held that an agreement between husband and wife, during coverture, could not be enforced in chancery; but in another, with the assistance of a trustee, it was held to be binding. *Nichols v. Palmer*, 5 Day's Rep., 47.

A deed of separation, without a *consideration*, is void, even between the parties thereto. *Cropsey v. McKinney*, 30 Barb., 48; *Calkins v. Long*, 22 Barb., 97. And in *Calkins v. Long* it was held that, if the separation be intended to be only temporary, then, if the husband offer to take back his wife, and to maintain her, it puts an end to the agreement, and a court of equity will not enforce the payment of the separate allowance to the wife. But if the separation be intended to be permanent, that is, during life, then the offer of the husband to cohabit with his wife does not put an end to the contract for separate maintenance. An indenture, entered into in contemplation of, and as an inducement to, a future separation between husband and wife, is void. *Florentine v. Wilson*, Hill & Denio (N. Y.), 303. Reconciliation and reconciliation avoid a deed of separation, but the husband may, nevertheless, so conduct himself afterwards as to contract a new obligation on the footing of the separation-deed. *Webster v. Webster*, 17 Eng. Law & Eq., 278.

(1) This doctrine is not without contradictory authorities. Chancellor KENT seems to be of opinion that the wife, after such separation, still retains the character of a married woman; and that the husband may recover damages for adultery committed with the wife while living apart from him, though the adultery does not cause any forfeiture of the provision under the deed of settlement. 2 Kent's Com. 178, in note; *Roper on Husband and Wife*, by Jacob, 301-322.

courts of law will interfere to give redress, though not in a suit brought by the wife against the husband. It has been determined that a seizure of the wife, in such a case, is a breach of peace; though it was done with an intent that she should live with him.

Where she was brought up before the court on a *habeas corpus*, and dismissed, it was holden by the court that an attempt to seize her was a contempt of court.

Mrs. Lester's case, 8 Mod., 22, is an authority to prove that a husband, after an agreement betwixt him and his wife to live separately, cannot compel her to cohabit with him. The court held such contract binding upon both, until they had dissolved it by living together. (1)

Settlement of property upon a wife, by articles of separation, does not affect the rights of purchasers or creditors, unless there be a covenant, on the part of some friend of the wife, or her trustees, to indemnify the husband. (2)

A husband settles on his wife, after marriage, certain lands for her separate maintenance, under articles of separation; although this land is not her separate property, and may be liable to creditors, yet, if creditors do not take it, she is entitled to the usufruct. By the settlement, he has renounced in her favor all claims to the usufruct. As he has no control over it, or interest in it, if she save money out of the profits, it is her own: she may convey it by will. (3)

[*93] * That courts of chancery have often decreed a separate maintenance, is indisputable. It seemed, until lately, to be understood by all lawyers and judges, as settled law, that, in all cases of separation, where the separation rested upon an agreement, courts of chancery had the power of decreeing a separate

(1) A subsequent reconciliation, and return of the wife, will destroy the deed of separation. 1 Jacob, 145.

(2) Vide note to page 91, marg.

(3) Bac. Abr., tit. Baron and Femme, M; Gage v. Lyster, 2 Bro. P. C., 4; Stephens v. Oliva, id., 90; Worrall v. Jacob, 3 Merivale's R., 266; 1 Roper, 205. So the wife may give or lend the income of her separate estate to her husband, who will be accountable for it. Towers v. Hayner, 3 Wharton's Penn. Rep., 42.

maintenance. Some late decisions have rendered this doctrine questionable. 2 Ves., 352.

The profits made by a wife, of her separate estate, are at her disposal. Pr. in Chan., 255.

In 9 Mod., 68, 70, 79, there is authority to show that property devised to a *femme covert* may be holden to be her separate property, the intention of the testator being fairly understood, taking the whole will together, although it were nowhere in the will declared to be his intention. (1)

If the husband covenant to suffer the wife to receive and enjoy any legacy that may be given to her, his right to such legacy ceases.

So, too, where he covenanted to renounce his right to the usufruct of her real property, and she conveyed, by the ordinary mode of conveyance, not by fine or common recovery, and without joining the husband in the conveyance, it was held a valid conveyance, and I apprehend on the most substantial grounds. (a) No reason can be given why the husband should join, when he had no interest in the thing sold.

This doctrine, that the articles of separation are binding, is fully recognized by a series of decisions that have never been controverted. Husband and wife articted to live apart, with an allowance by the husband of a separate maintenance to the wife. The husband afterwards pretended that he was reconciled to the wife, and forcibly seized upon her person. (b) The court set her at liberty, on the ground that the agreement should bind both until both agreed to cohabit together. (c) So in Burrow the court* held such an agreement to be a formal renunciation by the husband of his marital rights to compel his wife [*94] to live with him. The same doctrine is held in Vernon and

(a) Stra., 478; 2 Atk., 511.

(b) 8 Mod., 22.

(c) Burr., 432, 497, 542.

(1) To this point see Beale v. Dodd, 1 Term Rep., 193; Horseman v. Abbey, 1 Jac. & Walk., 381; Jameson v. Brady, 6 Serg. & Rawle, 467; Torbert v. Twining, 1 Yeates' R., 432; Perry v. Boileau, 10 Serg. & Rawle, 208; Evans v. Knora, 4 Rawle, 497. But the intention of the testator to deprive the husband of any benefit from the property must be clearly expressed, or at least the fair inference from all the provisions of the will. Carroll v. Lee, 3 Gill. & John., 504; Bouvier's Ed. of Rec. Abr., tit. Baron and Femme, M.

Precedents in Chancery, and a case in Brown's Chancery. (a) These cases fully prove that the husband is bound by such his agreement; and that every agreement, thus made by him yielding up his marital rights, or providing for his wife thus separated, is valid.

Any agreement entered into to provide for the support of the wife, in case it should be necessary for husband and wife to separate, has also been held a binding agreement.

It was urged, in this case, that it was contrary to sound policy to give effect to an agreement which had a tendency to facilitate a separation betwixt husband and wife; (b) but the court gave effect to the agreement. The court observed, that many contracts had been established, which had that tendency; that, however it might have been better policy to have considered such contracts as vicious, yet the question had been laid at rest, for a long period, by repeated decisions; that sanctioning articles of separation had this tendency, and yet this doctrine could not now be called in question; that provision for pin-money, or any separate provision for the wife, tends to render her independent of the support and protection of her husband; but that all those points were well established, and could not now be rejected on the ground of supposed illegality in such transactions.

The court considered a case in Ventris as supporting the decision in this case, and also a decision in Vernon as a case in point. (c) Here the husband, having treated his wife ill, gave her a note that if he should ever again maltreat her she should have £8,000 for her own use. The husband having again maltreated his wife, the court decreed the note to be paid. Whether [*95] it is the best policy * that such contracts should receive the countenance of courts of justice, is not now necessary to be examined. That it is not contrary to sound policy, we have this evidence, that *lex ita scripta est*. When this question is viewed on one side only, we may be led to conclude that it had been better to have established a doctrine opposite to that which now prevails. There can be no doubt but that the indulgence given to wives by this doctrine has been often abused by proud

(a) Ver., 386; Pr. in Chan., 614, 496; Bro. Chan. Cas., 614.

(b) 2 East., 833.

(c) 2 Vent., 317; 2 Ver., 67.

vicious women. On the other hand, we ought to remember that husbands are not always perfect. They have their caprices, vices and follies, as well as wives. Whatever evil may have resulted from those decisions, great good has also been the consequence. Many an amiable, virtuous wife has, by this means, been secured against the tyranny and brutality of an unfeeling, dissipated, libertine husband, and delivered from poverty, distress and the most shameful abuse. Many families of children have been provided for, and so educated as to become the ornaments of the age in which they lived; who, had it not been for those decisions, would have been lost to the world, or, what is more probable, have been a curse to it. I acknowledge, I feel no disgust at a doctrine that has such a powerful tendency to promote the comfort of the better half of the human race. In Brown's Chancery Cases (a) we have the opinion of Justice BULLER upon the effect of articles of separation. If it be law, says he, that, after separation, with a competent allowance by husband to the wife for maintenance, the husband cannot be sued for the debts of the wife; if she can be sued alone; if a second husband be liable jointly with her, for debts contracted during separation; if the articles are such a formal renunciation of marital rights, the husband cannot seize the person of the wife without being guilty of a breach of peace; if all, or any of these be law, they will go a great way toward proving, * that after such separation, [*96] the wife shall be considered, in all respects, except for the purpose of marrying again, as a *femme sole*. All these points, he observes, have been determined; and I know of no reason why these decisions should not be as religiously and sacredly observed as any judgments that ever were rendered by any set of men; for I believe that they are founded in good sense, and adapted to the understanding, the welfare and interest of mankind. It is fully settled, that when there are articles of separation, purporting a perpetual separation, that no offer by the husband, to receive such wife again, and maintain her, will prevent chancery from executing the agreement. Nothing but the mutual agreement of the parties to cohabit together, will ever discharge

(a) 3 Br. in Chan., 304, 305.

the husband from performing the covenants contained in the articles.

A covenant on the part of the husband to pay annually such a sum, for a separate maintenance to his wife, will be enforced against him; but against creditors, such an agreement, being voluntary, cannot prevail. (a)

Property assigned by the husband to a trustee, to maintain his wife, upon articles of separation, is not her separate property, nor can she dispose of it, as granting an annuity. It would be unreasonable to admit this idea, since articles of separation, whatever effect they may have between themselves, can have no operation where third persons are concerned; for, if she should become a pauper, the parish might call upon her husband to maintain her. Her husband's settlement would be her settlement; and her husband would be liable with her for her slander or trespass. It is because they live separate, that the husband cannot be sued, for no credit is given him. She cannot be sued, unless he has renounced his right to the person of his wife; for if she could be sued on her contracts, the person of his wife [*97] might be taken from him * without his consent. When that right is renounced, by articles of separation, I perceive no reason why she should not be liable on her contracts. 3 Ves., Jr., 443.

Notwithstanding some doubts which have been entertained, we may safely conclude that, when husband and wife agree to live separate, and the husband covenants with a trustee to allow a certain maintenance to the wife, or gives a bond to a trustee, such covenant or bond is binding on the husband. It has been contended that it is in the power of the husband to set aside such obligations, by offering to receive his wife into his family; but equity decrees otherwise; proceeding upon the ground that such an agreement cannot be dissolved without mutual consent. It has been contended that, to give efficacy to such an agreement, the trustee must covenant to indemnify the husband against the wife's debts, as was the case in 2 Vern., 386. See also Pr. in Chan., 496; but this is not necessary to enable the court to

(a) 3 Ves., 386; P. in Can., 497; Stra., 478; 2 Atk., 511; 3 id., 547; 3 Bro. in Can., 80; 3 id., 614.

enforce the contract. In 2 Atk., 511, the court decreed the trusts to be performed against the husband, when there was no covenant to indemnify the husband. The same point was fully settled in 10 Ves., 191. It will be remembered that this right is considered as so vested in the wife that, if the trustee should refuse to bring forward a suit, the wife may file her bill by her *prochein ami* to enforce the contract, as was the case in 10 Ves., 191. Although chancery has enforced such contracts, their legality has been questioned in courts of law; but it is now fully settled that such contracts are valid at law. 2 Vent., 217; 2 East., 283. Such contracts will not be enforced to the prejudice of creditors. 2 Atk., 511, 599; 2 Pr. in Chan., 90. (1)

(1) Upon a consideration of the decisions upon the subject of agreements for a separate maintenance, the following conclusions are readily arrived at. First, that they are valid and will be enforced both at law and in equity, without the intervention of a trustee to support them. Secondly, that they are valid both against purchasers and creditors, when made in pursuance of an agreement in writing, entered into by the parties anterior to the marriage; the marriage, in such case, being a valuable consideration for the settlement, and that when made after marriage, though void as against creditors at the time of the conveyance, they are valid against subsequent purchasers and creditors; and, thirdly, that they are not contrary to the spirit and policy of the law. It would indeed be strange that, when, from family discords or otherwise, a separation between husband and wife becomes indispensably necessary to the happiness of both, that the law should refuse its sanction to a provision made by the husband to shield the wife, where he is amply able and willing to place her in a situation where she will be protected from poverty and want, and no longer be a burden upon her friends; or when his brutal insults may have driven her forth upon the world, that the law should not grasp at that momentary relaxation of his barbarity which influences him to provide such a settlement for his wife. But this question is now too well settled to be longer susceptible of litigation; and the courts of law and equity, both in England and the United States, now almost universally lend their assistance in carrying out the humane provisions in support of the wife. *Fitzer v. Fitzer*, 2 Atk., 511; *Cooke v. Wiggins*, 10 Ves., 191; *Rodney v. Chambers*, 2 East., 283; *Ross v. Willoughby*, 10 Price, 2; *Todd v. Stokes*, 1 Salk., 116; *Nurse v. Craig*, 5 Bos. & Pul., 148; *Hindley v. Westmeath*, 6 Barn. & Cress., 200; *Shelthar v. Gregory*, 2 Wend., 422; *Carson v. Murray*, 3 Paige, 483; *Rogers v. Rogers*, 4 id., 516; *Reed v. Beasley*, 1 Black Ind. Rep., 97; *Rundle v. Murgatroyd*, 4 Dallas, 304; *Magniac v. Thompson*, 1 Bald. C. C. U. S. Rep., 344; *Scott v. Lorraine*, 6 Munf., 117; *Bray v. Dudgeon*, id., 132; *Tyson v. Tyson*, 2 Hawks. Rep., 472; *Orostwaight v. Hutchinson*, 2 Bibb, 407; *Browning v. Coppage*, 3 id., 37; and see, also, *Bingham on Infancy and Coverture*; *Roper on Husband and Wife*, *passim*.

[*98]

*CHAPTER VIII.

CONTRACTS BY WHICH A WIFE MAY BIND HERSELF. THE HUSBAND'S POWER TO DISSENT TO THE WIFE'S PURCHASE, AND TO DIVEST THE WIFE OF REAL PROPERTY PURCHASED BY HER.

WHEN may a wife so contract as to bind herself, and when not?

It is a general rule that a wife cannot so contract as to bind herself; her contracts are said to be void in law. The principles on which this doctrine is founded are two: 1st. The right of the husband to the person of his wife. This is a right guarded by the law with the utmost solicitude; if she could bind herself by her contracts, she would be liable to be arrested, taken in execution, and confined in a prison; and then the husband would be deprived of the company of his wife, which the law will not suffer. 2d. The law considers the wife to be in the power of the husband; it would not, therefore, be reasonable that she should be bound by any contract which she makes during the coverture, as it might be the effect of coercion. On the first ground she is privileged for the sake of her husband; on the last, for her own sake.

Notwithstanding this doctrine, cases are to be found in the books where the wife has been held liable on her contracts entered into during coverture. The true criterion, by which we determine whether she is liable or not upon her contracts, is, when ever the aforesaid marital right can be affected, and whenever we can presume a possibility of coercion, her contracts are utterly void; but if we can find a case when no marital right can be [*99] *affected, and every presumption of any possible coercion is removed out of the way, the wife is bound. (1)

(1) 2 Kent Com., 150; 1 H. Black. Rep., 346.

It was held, in *Coon v. Brook*, 21 Barb., 546, that, under the statutes of 1848, 1849, of New York, no power is given to married women to make themselves liable on any contracts on which before they might not have been liable, and the promise

The words of that distinguished character, Lord HARDWICKE, in 1 Ves., 305, are these: The disability arising from coverture, is not for want of discretion, but because she is under the power of the husband; this position I take to be correct, and the con-

sory notes of such women are still void. See, also, *Howe v. Wilder*, 34 Maine, 566; *Roach v. Randall*, 45 Maine, 438. It is a disputed question in New York whether the wife can convey land directly to her husband, under the statutes of 1848 and 1849. In *Winans v. Peebles*, 31 Barb., 371, it was held that she might; while the contrary was held in *White v. Wager*, 32 Barb., 250. It was provided by the acts of 1848 and 1849 that married women might convey their separate real estate; and chapter 90, Laws of New York, 1860, provides that "any married woman, possessed of real estate as her separate property, may bargain, sell and convey such property, and enter into any contract in reference to the same, but no such contract shall be valid without the assent in writing of her husband, except as hereinafter provided." The provision referred to above is to the effect that, in case of the husband's unreasonable refusal or inability to give his assent, she may obtain leave, by application to the county court, to sell without such assent of the husband. The statute of 1860, chapter 90, provides further that "a married woman may bargain, sell, assign and transfer her separate personal property, and carry on any trade or business, and perform any labor or services, on her sole and separate account," &c. By the R. S. of Maine, 1857, chap. 61, the wife may convey real property without the assent of her husband. In New Hampshire, by statute, the wife may convey her lands alone, 1st, when the husband has deserted her for three months without providing for her or her children, or if any facts exist which are, or, if continued, will become, a cause of divorce, and the wife is the injured party; 2d, if the wife of an alien or citizen of another State shall reside in this State six months successively separate from her husband; 3d, if the parties contract, before marriage, in writing, that the wife shall hold the whole or any designated part of her property to her sole and separate use; 4th, where a conveyance or devise is made to her sole and separate use, free from the control or interference of her husband." Comp. Stat. of N. H., 380; *Eaton v. George*, 40 N. H., 261. Deed of married woman held not valid, her husband not joining, under statute of 1848, in Pennsylvania. *Peck v. Ward*, 18 Penn., 506. See, also, *Scott v. Purcell*, 7 Blkf., 66; *Richards v. McClelland*, 29 Penn., 385. And held void, even though her husband has abandoned her, in *Thorndell v. Morrison*, 25 Penn., 328. The court dispensed with the concurrence of the husband (who was living separate from his wife) in a conveyance of property in which the wife had a separate interest, where the husband refused to execute the deed. *Perrin in re.*, 26 Eng. Law and Eq., 292. And so, in case of the desertion of the husband, leaving her destitute. Lord in re., 30 Eng. Law and Eq., 519. The act of 1848, in Pennsylvania, does not remove the disability of the wife, resulting from the marriage contract, to bind herself by bond. *Glyde v. Keister*, 32 Penn., 85. And to make a note of a married woman good under that statute, it is necessary to allege the special circumstances which make her liable to an action, notwithstanding coverture. *Mahon v. Gormley*, 24 Penn.,

sequence is clear, that when she ceases to be under his power, there is no solid objection to her managing her own estate as she chooses, if no marital right is affected by it. Thus it was held that the wife of a man who was banished the realm could contract, could sue and be sued in her own name; for, in this case, no right of the husband could be infringed. (a) He was already deprived of the company of his wife, and her confinement in prison would not deprive him of his wife to any greater extent than was already the case: neither could she be under any coercion; all presumption of this was removed by his banishment,

(a) *Baron and Femme*, 56; *Co. Litt.*, 180; *Roll.*, 400; *Moor*, 536.

90. It is sufficient, in an action on a note against a married woman, to allege, in affidavit of defence, the coverture, and that the note was not given for necessities. *Imhoff v. Brown*, 30 Penn., 504. Held, in Vermont, that the wife, after marriage and while living with her husband, is incapable of contracting a debt against herself. *Farrar v. Bessey*, 24 Vt., 89. Wife may contract for necessities for her maintenance when her husband has deserted her, and she maintains herself. *Wag's exec'r v. Gibbons*, 5 Ohio (N. S.), 580; *Smith v. Silence*, 4 Iowa, 321. The wife cannot contract, under the laws of California, so as to render her liable in a suit at law. *Rowe v. Kohle*, 4 Cal., 285; *Simpers v. Sloan*, 5 id., 457. And see, also, *Wooster v. Northrup*, 5 Wis., 245.

A married woman cannot, by her next friend, maintain an action against her husband for debt on contract made during coverture under the act of 1848. *Ritter v. Ritter*, 31 Penn., 396; *Bear's adm'r v. Bear*, 33 id., 525. Money received by a husband from his wife's separate estate, after act of 1848, is presumed to have been received for her, and an agreement to repay it will be binding on the husband's estate. *Johnson v. Johnson's adm'r*, 31 Penn., 450. A wife, with the consent of her husband, may indorse her promissory note, made payable to her during coverture, and pass a good title to the indorsee. This is on the principle of agency. *Stevens v. Beals*, 10 Oush., 291. One is bound by a contract made with a *femine covert*, after she has performed all that she stipulated to perform as a consideration for the promise, and the husband and wife may maintain an action upon it, although such contract was at first void by reason of her coverture. *Ham v. Boody*, 20 N. H., 411. A married woman, possessing a separate estate, induced the plaintiff to do work for her son, by promising payment, and after its completion and during coverture acknowledged the obligation, and, after divorce *a vinculo matrimonii*, renewed the promise. And it was held that she was liable, on the ground that her promise during coverture constituted a moral obligation, which was a good consideration for a promise after coverture. *Hemphill v. McClimans*, 24 Penn., 367. But in New York, a mere moral obligation is held insufficient as a consideration to support a promise in such a case, unless founded on a previous *legal liability*. *Goulding v. Davidson*, 28 Barb., 438; *Watkins v. Halstead*, 2 Sandf. S. C. R., 311.

which prevented any possible access to her. (1) This case has always been admitted to be law; and I apprehend it demonstrates that coverture, of itself, is no disqualification of a wife from so contracting as to bind herself, unless some right of her husband or of herself may be affected by it; for no man can deny, in the case put, but that the wife is still the wife of the banished man, his banishment notwithstanding. I know it is said that the person banished is considered as *civilitur mortuus*; but in this position there is no truth. If he were *civilitur mortuus*, his wife would be in fact a *femme sole*, and could marry again, without obtaining a divorce, and it will not be pretended that she can. Could administration be granted on his estate, as on the estate of a deceased person? I trust not. Again, it was determined, that the wife of a man who had abjured the realm might so contract as to bind herself. (2)

*The same reasons exist in this case as in the last; (a) [*100] it was then determined that the wife of an alien enemy might so contract as to bind herself; for the same reasons, no right of the husband could be affected by her contracts; for he could not enjoy the company of his wife, nor could she be under the coercion of the husband, so that no right of his could be infringed. It was then determined, that the wife of a man transported for seven years might bind herself by her contracts, on the same principles which govern the other cases before mentioned. (8) In the two last cases, there never was, and never

(a) Salk., 116; Comb., 403; Ld. Raym., 147; 2 Salk., 646.

(1) But it is expressly laid down by the best authorities, that a husband who is banished the realm is accounted in law *civilitur mortuus*, and hence the reason of the decisions. It is the established doctrine that in such case the wife may sue or be sued in her own name; nor is there any distinction where the husband has abjured the realm. See next note.

(2) The following authorities fully sanction the right of the wife to sue or be sued where the husband is *civilitur mortuus*: Bac. Abr., tit. Baron and Femme, M; 2 Kent's Com., 164; Robinson v. Reynolds, 1 Vik. Vert. Rep., 174, where all the cases on this point are critically reviewed by Ch. J. SKINNER.

(3) It has long been settled that the wife of an alien may contract so as to bind herself; and the doctrine is too well established to be controverted. The case, cited by the author from 1 Ld. Raym., 147, of Derry v. The Duchess of Mazarine, placed

can be, any pretence that the husband was *civiliter mortuus*, and I have never heard that the authority of these cases has been shaken, or attempted to be shaken. (a) Since these determinations, the question has arisen, whether a woman, living separate from her husband by articles of agreement, with a separate maintenance, can so bind herself as to be liable on her contract; a course of decisions seemed to have established it as an indisputable point that she could; (b) a very different opinion, however, has been entertained by many eminent lawyers; they contended that these cases introduced new principles, wholly unknown to the common law; and the authority of those decisions have since been shaken by subsequent opinions; it must,

(a) 1 Bro. Ch., 7, 308.

(b) See the case Corbitt & Poelnitz, and the cases there cited in 1 Durnford & East.

this right of the wife on the ground that it came within the doctrine of the common law, where the husband had abjured the realm; although, in that case, the husband had been divorced in France, which, of itself, might have been a sufficient reason for the decision. The cases of Welford v. The Duchess of Pienne, 2 Esp. N. P. R., 554; De Gaillon v. L'Aigle, 1 Bos. & Pul., 357; Carroll v. Blencow, 4 Esp. N. P. Rep., 27; Franks v. The Duchess of Pienne, 2 id., 587; Gregory v. Paul, 15 Mass. Rep., 31; Robinson v. Reynolds, 1 Aik. Vt. Rep., 174; Troughton v. Hill, 2 Hayw., 406; Abbott v. Bayley, 6 Pick., 89, are strong authorities in support of the position of the text. But the wife of a person who has been absent six or seven years in the East Indies, cannot be considered as a *femme sole*. Commonwealth v. Collins, 1 Mass. Rep., 116. Nor will any mere temporary absence of the husband entitle her to be so considered. Robinson v. Reynolds, *ut supra*. But where the husband was a convicted felon, and sentenced to transportation for fourteen years, the wife was held liable to be made a bankrupt where she traded on her own account. *Ex parte* Franks, 1 Moore & Scott, 1.

In Gregory v. Paul, 15 Mass. Rep., 31, it was held that where the husband had deserted the wife, who came to this country and remained for five years, and during that time lived and maintained herself as a *femme sole*, and the husband was an alien who had never been here, that the wife might take a legacy, and sue and be sued, as a *femme sole*. So where he had deserted his wife, and refused to perform his marital duties, the acquisitions of property by the wife, during such desertion, are her own, and she may dispose of them as she pleases. Starett v. Wynn, 17 Serg. & Rawle, 130; and if the husband depart from the State and take up his residence in a foreign country, the wife is entitled to the same privileges. Bean v. Morgen, 4 McCord, 148; Brown v. Killingworth, id., 429; and see also Rabe v. Hanna, 5 Ohio Rep., 531. If any cause of action accrue to the wife, while the husband is *civiliter mortuus*, it will belong to her after his death. Cornwall v. Hoyt, 7 Conn. Rep., 420.

therefore, at present, be considered as *questio vexata*. (1) That we may determine on which side the truth lies, we will inquire, is any marital right of the husband infringed? Certainly not; for, by his own agreement, and such a one as the English law recognizes as valid, he has renounced all claim to her person. It is therefore immaterial to him whether she resides in a palace or a dungeon; on his account, therefore, there can be no objection why she should not so contract as to bind herself. Is she under any coercion of the husband? Certainly not; for she is wholly out of his power, and in the *enjoyment of all that liberty [*101] of acting which is enjoyed by an unmarried woman. Those contested decisions, then, have introduced no new principles, but have applied old established principles to new cases. I do not contend, as has been done by some, that she was liable on account of having a separate maintenance; that will have the effect of securing him from any liability to fulfill her contracts for necessities. But it does not follow, that because he is not liable, that she is; for when she elopes with an adulterer the husband is not liable for her contracts for necessities, neither is she herself. The ground on which I place it is, that they lived separate, under articles of agreement, which were binding upon them, by which articles the husband renounced all his rights to the person of his wife, and placed her beyond the reach of any possible coercion. The cases would have been determined in the same manner, if there had been no separate maintenance; for they proceed upon the ground of rendering her liable to the extent of her contracts. Whereas, if the fact of having a separate maintenance were the ground of the decision, her liability must have been commensurate only with the amount of her separate maintenance.

It will not be unprofitable to examine how far the decisions, both before and subsequent to the case of Baron Poelnitz, which seem to be hostile to that decision, are so in reality. It must be

(1) A concise view of some of the modern cases on this subject will be found in note 1, page 191. As some of these decisions rather militate against the opinion of the author, his excellent review upon the leading cases will not be commented upon.

admitted, that some of them were opposed to the principles of that decision. The principle was, that the wife was liable on the ground of her separate maintenance, which several of the learned judges seemed to have supposed was the ground on which that case and some others were decided. If that was not the true ground of those decisions, but the true ground was, that the husband had, by his own deed, abandoned all his marital [*102] rights, and, therefore, could have had no * interest in the question, whether his wife was liable to be taken on an execution, or not; agreeably to the opinion of the chancellor in 2 Vesey, where he says: If the husband and wife are separated by deed, an action may be brought against the wife alone: I apprehend that no one of the cases militate against the doctrine of that case. The first which I shall notice, is that of *Hatchet v. Baddely*, reported in Judge BLACKSTONE. The defendant, in that case, pleaded her coverture. (a) The replication admitted the coverture; but stated that she had eloped from her husband; that she had always, since that time, lived separate from her husband; and that the articles, for which the suit was brought, were furnished her since her departure from her husband, and on her credit only. This was demurred to, and the replication was holden ill. But, in this case, the husband had never abandoned his right to his wife. She was then living from him, in defiance of her duty, and he had a right to reclaim her at any time. To suffer her to be bound by her contract, would render her liable to an execution, and thus the husband be deprived of her person. The wife never can, by any act of her own, place herself in such a situation as to deprive him of his marital right to her person. To have made this case like that of Baron Poelnitz, there must have been a covenant on the part of the husband that his wife might live separate from him; for, in that case, he would not have any more interest in her person than any man in the community. The next case determined in the same manner, is *Lea v. Shultz*, reported in Judge BLACKSTONE. (b) In that case, there was a voluntary separation, and a separate maintenance of the wife. As to the last, whatever effect the separate maintenance might have, to screen him from her

(a) 2 BL., 1079.

(b) 2 BL., 1995.

contracts, is nothing to the present purpose; for I agree that his not being liable to pay her contracts, fixes no liability upon her. In this case there was no covenant to prevent the *hus- [*103] band from claiming his wife, whenever he pleased; it is true there was a voluntary separation, to which he could put a period at pleasure. His marital right, therefore, might be affected, if his wife were liable on her contracts; for she might be confined in a prison, when he was about to put a period to this temporary separation; this case does not, therefore, militate against the case of Baron Poeluitz. The next case is that of *Gilchrist v. Brown*, reported in Term Reports. (a) This case was an *assumpsit* for goods sold and plea coverture: replication that before the promises, &c., the defendant, being married, committed adultery; and that afterwards, and before making the promises, the husband separated from the bed and board of the defendant, and cohabitation with her; and that she had ever since lived separate in a state of adultery, and, so living, made the promises, &c., and the articles for which the suit is brought were furnished on her separate credit. This replication was holden ill. The court, indeed, say this is not like the former cases, where the wife was holden liable, for, say they, there was no separate maintenance. In this case the judgment was undoubtedly correct, but, I apprehend, the true reason on which such judgment ought to have been rendered was, that in this case there were no articles of separation. No covenant had been entered into by him, relinquishing his right to the person of his wife. It was not, therefore, in her power to place herself in such a situation as would affect his marital right to her person.

The next case is that of *Ellah v. Leigh*, reported in Term Reports. (b) In this case it appeared that the husband and wife had separated, but there were no articles of separation or covenants. A suit was depending between them, in the consistory episcopal court in London, and a temporary alimony was allowed to the wife, during the pendency of the suit. Coverture was pleaded, and the *above stated facts were replied, and [*104] that the articles, for the price of which the suit was brought, were furnished on his credit. This replication was

(a) 4 T. R., 76.

(b) 5 T. R., 976.

holden ill. Here is not the least resemblance betwixt this case and that of Corbett and Poelnitz. I know that, in this case, Lord KENYON shows great symptoms of disgust with the last mentioned case, but the case did not require the observations made by him; but, in the opinion given by Justice LAWRENCE, the true ground of the decision is seen. He observes, that in the case of Corbett *v.* Poelnitz, they so far considered the wife a *femme sole*, for the remainder of her life, that the husband had no right to the person of the wife afterwards. And, why so? The answer is obvious; he had covenanted to give up his right to her person.

The next case is reported in Term Reports. (a) This case is merely a case of a wife separating from her husband, and carrying on the trade of a haberdasher, and the goods sold were on her credit. She was dead, and had made her will, and the suit was against her executor. The plaintiff could not prevail, for, unless she could be sued, her executor could not; for there was no covenant that would affect the right of the husband to her person, or the property that she might acquire. An executor is only liable to the extent of assets, and the property left by her never was vested in him, but belonged to the husband. The reasoning of Lord KENYON, in that case, does not seem to me to oppose the idea of the liability of a *femme covert* being sued, when there is a covenant to live separate, unless that covenant was temporary. Justice LAWRENCE's opinion seems to rest, in that case, on this idea, that the wife could not acquire the property left.

The last case which I shall notice is reported in Term Reports: (b) in this case, I admit, that from the reasoning of the court, it is apparent that they meant to overthrow the cases of Ringstead *v.* Lanesborough, Burwell *v.* Brooks,* and Corbett and [*105] Poelnitz; yet the decision, in this case, independent of opinions no way necessary to be given, does not stand opposed to those decisions. If indeed those decisions be supported on the ground of there being a separate maintenance allowed the wife, the decision in this case is opposed to these; but if those decisions rest upon the covenant to live separate, as I contend, this case is

(a) 6 T. R., 604.

(b) 8 T. R., 545.

not opposed to those. It appears on the record, that there was no covenant to live separate. The defendant's rejoinder admits a separation, and states the covenant to be, that the husband should pay the separate maintenance, as long as the wife should suffer the husband to live separate and apart from her, and should do certain other things not connected with the question which we are considering. To this there is a demurrer. There was then no covenant to live separate, but only an agreement to pay so much as long as they did. The wife could make her challenges as a wife, whenever she pleased, and there was no renunciation of any marital right whatever to her person. The decision was perfectly correct, on the ground on which I have considered this subject, and in nothing hostile to the case of Corbett and Poelnitz. (1)

(1) The doctrine of the later cases is in direct hostility to the case of Corbett v. Poelnitz, nor do we think a decision is to be found on this side of the Atlantic sustaining it. The case of *Marshall v. Ructon*, 8 Term Rep., 545, reviewed in the text, we think fully sustains the proposition that a *femme covert* cannot sue or be sued, alone, while living apart from her husband under a deed of separation, and the following cases in England establish the doctrine too positively to be controverted: *Hyde v. Price*, 3 Ves., 443; *Beard v. Webb*, 2 Bos. & Pul., 105; *Wardell v. Gooch*, 7 East, 582; *Lord St. John v. Lady St. John*, 11 Ves., 529. And the same doctrine is held in New York: *Baker v. Barney*, 8 John. Rep., 72. So, in *Hunt v. De Blaquiére*, 5 Bing., 550, it was held that a *femme covert*, divorced *a mensa et thoro*, could not sue and be sued as a *femme sole*. But in Vermont there is no distinction between divorces *a vinculo matrimonii* and *a mensa et thoro*. See also *Lewis v. Lee*, 3 Barn. & Cress., 291; *Hookham v. Chambers*, 9 Brod. & Bing., 92; *Fairthorne v. Blaquiére*, 6 M. & S., 73; 1 Binn., 586. But in some of the States the wife, in imitation of the custom of London, may become a *femme sole* trader, and as such sue and be sued without joining the husband. *Burke v. Winkle*, 2 Serg. & Rawle, 189; 2 Bay's Rep., 162; *South Carolina State Reports in Equity*, 148. But in the latter State it is said, for the purpose of protecting the wife, she cannot be sued without joining her husband. 4 McCord, 413. And in Pennsylvania the privilege extends only to the wives of husbands who have gone to sea, and where the wives are left to gain a livelihood by shopkeeping or any other trade. For the peculiar powers and privileges allowed to a *femme covert* in Louisiana, see Louisiana Rev. Code, art. 128, 2412. In Vermont, also, the doctrine is, that the wife's living apart from the husband under a deed for a separate maintenance will not enable the wife to exercise the rights of a *femme sole*, per SKINNER, Ch. J., in *Robinson v. Reynolds and wife*, 1 Aiken's Vt. Rep., 174.

The power of a married woman to carry on business on her own account, and to

The Queen of England may sue and be sued without her husband; and the reason given is, that she has separate property, over which the king, her husband, has no control; and no marital right can thereby be affected. I presume her person is not liable to arrest. The case of *Baggell v. Truman*, 11th of East., 801, has been thought by some to exhibit a principle opposed to those which determined the case of Baron Poelnitz: it was an action of trespass by a wife, for entering her house and taking her goods. Coverture was pleaded, and a replication

sue and be sued, is regulated in different States by statute. In New York, "any married woman may sue and be sued in all matters having relation to her property, which may be her sole and separate property, or which may hereafter come to her by descent, devise, bequest, or the gift of any person except her husband, in the same manner as if she were sole." And "any married woman may bring and maintain an action in her own name for damages against any person or body corporate for any injury to her person or character, the same as if she were sole; and the money received upon the settlement of any such action, or recovered upon a judgment, shall be her sole and separate property." N. Y. Statutes of 1860, ch. 90, sec. 7. The Code of New York provides, sec. 114, that, "when the action concerns her separate property, she may sue alone. When the action is between herself and her husband, she may sue or be sued alone. And in no case need she prosecute or defend by a guardian or next friend." In Wisconsin, her husband must be joined, except, when the action concerns her separate property, she may sue alone; and, when the action is between herself and her husband, she may sue and be sued alone. R. S., Wis., 1858, page 535, sec. 38. In Minnesota the same provisions are made as above, but, when her husband shall not be joined with her, she must prosecute or defend by her next friend or guardian, except in actions between herself and her husband. Statutes of Minn., 1849, 1858, page 535, sec. 30. So also in Indiana; but in no case is she required to sue or defend by guardian or next friend, except she be under the age of twenty-one years. Vol. 2, R. S., Ind., ch. 1, sec. 3. In Ohio, when a married woman is a party her husband must be joined with her, except when the action concerns her separate property she may sue without her husband by her next friend. And when the action is between her and her husband she may sue and be sued alone; but in every such action, other than for divorce or alimony, she must prosecute and defend by her next friend. Ohio R. S., 1860, vol. 2, page 954, sec. 28. In Mississippi, husband and wife may sue jointly, or she may sue alone, if her husband will not join her, for the recovery of any of her property or rights. Revised Code of Laws of Miss., 1857, art. 26, page 335. When abandoned by her husband, the wife may, in Connecticut, transact business in her own name, and sue and be sued as a *femme sole*. Statutes of 1854, page 378. And in Vermont, when her husband is confined in state prison, she may, during such confinement, prosecute to final judgment any suit where the cause of action arose after the sentence of her husband. Compiled Stat., 1850, page 402, sec. 13.

of desertion by the husband, to America, for four years; the replication was held ill, as it must have been if the law of baron and femme is preserved entire. The decision, * in this case, does not oppose the case of Poelnitz. If the husband had renounced his marital rights, by articles to live separate, it would, in some measure, have overruled that case. There is an exception to the general rule; that the wife cannot so contract as to bind herself, even when living with her husband. The wife can, together with her husband, convey away her real property; but in England this can only be done by a particular mode of conveyance, viz., a fine or common recovery, which are effected by the interposition of a court; and are, in form, judgments of courts, but in reality are conveyances of real property. When a wife joins in a lease of her lands with the husband, such lease, on the part of the wife, is not void. It is true that it is voidable; but it is capable of being confirmed by the wife after the death of the husband; for if she should accept the rent reserved, the lease would be rendered valid. Cro. Eliz., 269. (1).

English lawyers discover some solicitude to preserve entire the maxim, that a married woman cannot contract; and therefore tell us that she is to be considered, in the transaction of conveying by a fine, as a *femme sole*, or, as some express it, *quasi a femme sole*: and that this is proved by the record of the court; for when we find that B, the wife of A, has acknowledged a fine in court, the presumption is that she was not a wife, for no wife can do this; and if she had been, the court would not have taken the acknowledgment. In this there is neither sense nor truth. Such judgment rendered by the court would be erroneous, if the wife could not convey in this manner; and every lawyer knows, and the courts know, that, by this mode of conveyance, a wife can and often does transfer her real property. Does not a court examine her, because she is a wife, whether she does it freely?

(1) Bac. Abr., tit. Baron and Femme; and if the husband execute a lease of his wife's land, and afterwards the husband and wife execute a lease of the same lands to another person, and such latter lease is acknowledged by the wife, she is thereby precluded from affirming the first lease, and the lessee under the second cannot be prejudiced by her acts. Jackson v. Holloway, 7 John. Rep., 81.

The truth is, it forms an important exception to the general rule, but if she had joined in any other mode of * conveyance [*107] with her husband, it would, as to her, have been utterly void, if she had elected so to have it.

Baron and femme levy a fine of the femme's land, on error brought for nonage of the femme. The fine was reversed; but a question arose, whether it should be reversed only as it respected the femme and her heirs, and remain good as to the husband. It was adjudged, that it should be reversed in toto. The reason of this reversal, as to the husband, is not obvious to my mind. The husband might have levied a fine of his estate in her hands, without his wife, and it would have bound him; and his joining his wife, who could not levy, by reason of her infancy, cannot render his act void. *Ely v. Todd*, 118; 1 Leon., 114; 2 Co., 77.

This common-law rule has also been infringed by a statute of Henry VIII, which rendered valid certain leases of the property of the wife by her husband and herself, for three lives of twenty-one years, subject to a variety of restrictions, for which I refer the reader to the statute itself. If husband and wife lease her lands, on the death of the husband she is not bound by her lease, unless she agree to it afterwards; (1) but it is said that, if she take a second husband, and he agree to the lease by acceptance of rent, and then he die, that she cannot avoid it. (2) The correctness of this opinion is very questionable: when she leased it with her husband, neither his agreement nor her own bound her; and when her second husband accepted the rent, it amounted to nothing more than his agreement that the lease continue, and ratified it without doubt, so that he could not avoid it; but a wife is never bound by the agreement of her husband respecting her real property, upon the principles of the common law; and all such agreements may be avoided by her, when the coverture is at an end. I cannot perceive any greater reason why she

(1) *Bac. Abr.*, tit. Leases, C.

(2) This doctrine is laid down in *Bacon's Abridgment*, title Leases, C, and the following authorities cited in its support; *Dyer*, 169; *Roll. Abr.*, 475; 2 *Roll. Rep.*, 132

should be more bound by the ratification of * the second husband than by the lease of the first. Dyer, 159; Rol. [*108] Abr., 475; Rol. Rep., 182. A *femme covert*, who, with her husband, levies a fine of her lands with warranty, is liable on the covenants of warranty. The deed of a *femme covert*, relative to a fine, is as conclusive upon her as a fine would be; (a) and when a *femme covert* levies a fine of her lands, not only the land passes, but she is liable on her covenants contained in the fine. 2 Saund., 180. Baron and femme join in a conveyance, not a fine or common recovery, to a stranger; and the stranger enters, the possession being given to him by baron and femme. To satisfy the purchase, the stranger conveys lands to the baron and femme, who enter; and of these lands the baron and femme levy a fine; the husband dies; the levy of the fine is no bar to the wife's entering upon her own land so exchanged. 1 Leon., 285. (1)

In Vernon, there is an authority which proves, that the agreement of a wife to levy a fine of her land was, by chancery, decreed against her, after the death of her husband. (b) It seems, however, to be *questio vexata* whether a *femme covert* is bound by a covenant which she enters into with her husband, to convey her real estate by fine. It is a well established point that, if she do convey by fine, she is bound, her coverture notwithstanding; but that she is bound by no other contract, either executed or executory; but it is undeniable that she is bound by other contracts which are entered into the conveyance by fine; as when she conveys with her husband, by fines and warrants, the land to the grantee, and the husband dies, and the grantee is evicted, she will be liable on her covenant of warranty. 2 Saund., 177; Sid., 146; 1 Mod., 290; 2 R. Abr., 684; id., 703.

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(a) 13 Mod., 161.

(b) 2 Vern., 225.

(1) In the United States, though a *femme covert* may pass her interest in real estate by deed, yet her covenant contained in a conveyance of real estate is not binding upon her, though the deed be duly acknowledged so as to pass the estate. Colcord v. Swan, 7 Mass. Rep., 291; Whitbeck v. Cook, 15 John. Rep., 483; Jackson v. Vanderheyden, 17 id., 167; Martin v. Dwelly, 6 Wend., 14; Nicholson v. Helmsley, 3 Har. & McHen., 409. But as to covenants for a future assurance, see Nelson v. Harwood, 3 Call. Rep., 394.

The authorities seem full to the point, that a wife is thus bound by her covenants of warranty in an executed fine; yet none of them, except cases in Ver., maintain the doctrine that a wife is [*109] *bound by a covenant to levy a fine. It is said that, whatever act a person is competent to do, so as to bind him, he may be bound by a covenant to do that act; and as a wife is competent to levy a fine, she ought to be bound by a covenant to levy. Doubtless this reasoning, as applied to most cases, is correct, and indeed conclusive; but it is fallacious in the present case; for every wife, before she levies a fine, is examined whether she does it voluntarily. She is not bound by a fine levied, if there be no such examination. This security, which the law interposes in her favor, against the coercive power of her husband, is wholly lost to her, if she be bound by her covenant to levy, where there is no examination whether she covenanted voluntarily or not. However slender the security of an examination is, against the coercion of the husband, yet, in the view of the law, it is considered as a security; and if she be bound by a covenant to convey her land, which might be obtained by coercion, where there is no examination, she is deprived of that protection which the law intended to afford her; but, to my mind, this is the only reason why she ought not to be bound. I should never question the soundness of those authorities which say that she is bound by her covenant to levy, if it were not for the provision which is made for her private examination before she conveys. In that case her conveyance, without examination, would be valid. She would have as much power to convey as her husband. She would, in this respect, be as much *sui juris* as her husband; of course as much bound to convey, if she had covenanted to convey, as he would be bound if he had covenanted to convey. (1)

(1) In Maine it has been decided that a wife cannot bind herself by an executory contract to convey her own lands, even though her husband join with her in the obligation. *Ex parte* Thomas, 3 Greenl., 50. But a *femme covert* may, with her husband, make a binding agreement for a partition of her lands, without a separate acknowledgment. Rhodes' appeal, 3 Rawls, 420, cited in Bouvier's ed. of Bac. Abr., II, page 51.

Where an ante-nuptial contract, executed previous to the act of 1848, for the

It is urged, that the wife is bound by all the covenants in the deed, when she levies a fine; and that there is nothing more repugnant to her rights, in compelling her to fulfill her covenant to convey, than in compelling her to * fulfill her covenants [*110] in her deed, when she has levied a fine. It is admitted that a wife is bound by her covenants, when she has levied a fine. The authorities to this point are full, and not *scintilla juris* to be found to the contrary. To this purpose is the 2d Saund., 117, and the numerous authorities there cited, in the last edition Sid., 146; 1 Mod., 190; 2 Roll. Abr., 684, 703; but it by no means follows that, because she is bound by the covenants in the deed, after the levy, that she is bound by a covenant to levy. The law has interposed a shield betwixt her covenant and herself, to defend her against levying a fine, and all its consequences, viz., a private examination whether she acts freely or not in levying a fine. If she will not avail herself of her privilege, when she is unwilling to buy, she then becomes liable to all the consequences of levying the fine. The instrument which she covenanted to execute was one which conveyed the land described in it, and also contained a covenant to warrant the land to be her land. This instrument she had power to execute, and to bind herself by means thereof, or, on a private examination, to refuse so to do. This one contract, viz., levying a fine, she had power to execute; and when this was done, it was valid. What, then, was this levy, that is, what was its effect? It was to pass the land, and bind the covenantor by the covenants therein contained. The wife could not avoid this contract of hers, any more than other persons can avoid their contracts generally; but when she covenanted, could she make a valid instrument without examination? Certainly not; for, unless this was done, the levy was void, that is, it might have been avoided. If, then, she refused

protection of the property of married women, gave to the wife full power to control and dispose of her real estate after marriage, as if she were a *femme sole*, it was held, that she could make a binding covenant to convey land at a future day, so as to form a consideration for the contract of the purchaser. *Van Allen v. Humphrey*, 14 Barb., 555. And in *Galusha v. Hitchcock*, 29 Barb., 193, it was held, that the executory contracts of a married woman are not absolutely void, but are valid in equity, when made upon the credit, or for the benefit, of her separate estate.

to do it, the assurance could not be made; it would be absurd to say, that she had lost this privilege by covenanting to levy; for, if she have, it puts an end to the supposed security given by law; for once procure the wife by coercion to * covenant, [*111] she will be bound to levy, and there will be an utter end of any private examination to any effect. But it is said that there are authorities from which it appears that a *femme covert* is bound to levy a fine, where she has covenanted so to do. Upon examination of the books, I find that there are several authorities to that purpose; and I also find, in every case reported on the subject, except one in Vern., that it appears from the report that the wife was a trustee, having the legal title, without any beneficial interest therein, and had covenanted to convey; and this, as trustee, she was compellable in chancery to do, without any private examination therefor. For examination did not exist in these cases; for they had no interest in the estate; and to have indulged them on a refusal, would have defeated the purposes for which the trust was created. As, where A mortgaged to B, who died before the day when the land was to be redeemed, and the mortgaged premises descended to the heir and daughter of B, she being a *femme covert*; she, together with the husband, covenanted to levy a fine of the mortgaged premises to A, on his paying what was due on the mortgage. A paid the money due on the mortgage; but she and her husband refused to levy the fine, which they had covenanted to do. The court compelled them to perform their covenant. Cases of this kind are numerous; and in every case where chancery decided that a wife should perform her covenant to levy a fine, it was a trust, and so appeared from the report to be, unless the case in Vern. was otherwise. From the report itself, it does not appear whether it was a trust estate or not; but as all the other cases were of trust estates, I presume that was also an estate of the same nature. I entertain no doubt, but that in every case where the wife has a beneficial interest in the estate, and the law is as in England, that [*112] a levy of a fine or any conveyance, which must be* attended with a private examination of the wife, and an inquiry made whether she acts voluntarily or not, is so, that she cannot

be compelled to fulfill a covenant to levy or convey; but in those States where the law does not require any private examination, and where there is no such usage, as in Connecticut, I can conceive of no reason why she should not be bound by a covenant to do that she has power to do, and which she has covenanted to do. (1)

(1) The method of passing an estate by fine and recovery is unknown to the laws of most, if not all, of the United States, and it is only from the analogy that it bears to the forms of conveyance usually resorted to for the purpose of divesting the wife of her estate during coverture, that a consideration of the many English cases upon the subject of fines and recoveries becomes at all important. That a wife during coverture has no power to make a contract binding upon herself, is one of the general principles of the law; but, like nearly all others, it has its exceptions. This, to use a favorite expression of the author, may "mar its symmetry," but, in general, the line is so distinctly marked to these exceptions as to render them by no means intricate. Thus a wife may, by deed executed with her husband and separately acknowledged, convey her real estate so as to bind herself and her heirs; and why? Because it would be highly inconvenient and impolitic that the separate real property of the wife should, *ex necessitate*, remain in precisely the situation during the existence of coverture that the marriage found it, when such change might be most beneficial to the interest of the wife and all persons claiming through her. Hence it is that this mode of conveyance is resorted to, as being, by virtue of the separate acknowledgment, the most secure from the coercion of her husband. But when the question of her liability on her covenants of warranty, made during the coverture, comes up, the rule of her inability to contract while a *femme covert* comes in to protect her from such covenants. It is believed that the doctrine that a wife may, by deed separately acknowledged from her husband, pass her interest in real estate, obtains generally throughout the United States; and it is somewhat surprising that a branch of the law of husband and wife, of so much importance and of so frequent occurrence as this, should not have been considered by the learned author as worthy of more importance. In this place the editor can do little more than present a list of the authorities in which this power and its consequences are recognized: 2 New Hamp. Rep., 176, 402; 5 Mass. Rep., 463; 7 id., 14, 295; 9 id., 161; 12 id., 525; 13 id., 472; 16 John. R., 110; 20 id., 301; 1 Binney's Rep., 470; 2 id., 341; 6 Serg. & Rawle, 49; 9 id., 293; 3 Har. & McHen., 430; 2 Rep. Cona. Ct. So. Car., 12; 3 Monr., 398; 1 Har. & John., 751; 1 Peter's Rep., 106; 1 Call, 190; 1 Munf., 518; 2 Hayw., 401; 1 Pick., 321; 1 Yerger, 413; 1 McLean, 13; 9 Ohio, 352. But the husband must always join in the deed, for he has an interest in the estate to be conveyed. *Andrews v. Hooper*, 13 Mass. Rep., 472; *Ela v. Card*, 2 New Hampshire Rep., 176.

When a *femme covert* conveys her land, but does not acknowledge the deed during coverture, she may give effect to it by an acknowledgment made after the coverture has determined, but in such case the deed only takes effect from the date of the

It is no uncommon thing to find a husband covenanting that his wife shall levy a fine, both of her own and of his real property. In the last case, it is done that she may be barred of dower in the estate; and in many early authorities, and down to modern times, we shall find that courts have decreed that he shall fulfill such covenant. The propriety of such decree has, however, been called in question. That such decrees have been made, see Toth., 106; Finch, 180; Eq. Ca. Abr., 17. Until the time of the last report, it does not appear that any judge called in question the legality of such decrees; but in a case, 4 Viner Abr., 203, Lord COWPER at first hesitated, and finally refused to decree against the husband. He said that, to decree a performance of such contract was a breach upon the law, which guarded

acknowledgment, and will have no relation to the time of its original execution. Doe v. Howland, 8 Cow., 277; and see Jourdan v. Jourdan, 9 Serg. & Rawle, 268; Shore v. Anderson, 7 id., 43. But when a deed made by the husband and wife is defectively acknowledged, although the purchase-money may have been paid by the grantor, equity will not enforce a specific performance of the conditions against the heirs of the wife. Martin v. Dwelley, 6 Wend., 10; Ferguson v. Kennedy, 1 Pick., 321. So when husband and wife executed a deed of the wife's land, but she did not acknowledge it at the time of the execution, and afterwards the husband and wife executed another deed of the same land which was duly acknowledged at the time by the wife, and she subsequently acknowledged the first deed, it was held that the land passed by the second deed, that being the first acknowledged. Duval et ux. v. Covenhoven, 4 Wend., 56.

A deed by husband and wife, of the wife's property, not acknowledged by the wife, gives to the grantee an estate for the life of the husband only. Curtis v. Follett, 15 Barb., 337. A deed, executed by the husband and the wife, for the wife's lands, but not delivered in her lifetime, cannot be rendered effectual to pass the estate, as against the heirs of the wife, by a delivery after her decease. Shoenberger's executors v. Zook, 34 Penn., 24; The Same v. Hackman, 37 id., 87. Where a deed of the wife's land purports to be the conveyance of the wife alone, and contains no recital that the husband is a party, but is executed by the husband and wife, it is the deed of both, and passes the title of both. Woodward v. Seaver, 38 N. H., 29. It was held in Sherman v. Garfield, 1 Denio, 329, that, although the deed of an infant is voidable only and not void, yet where an infant *femme covert* joined her husband in a conveyance of land of which he was seised in his own right, her conveyance was void, she having then no estate in the lands, but only a *capacity to be endowed* in the event she should survive him, and that, having survived her husband, she could maintain ejectment for her dower notwithstanding her conveyance, and although she had arrived at full age and had done nothing to disaffirm it.

the real property of the wife with great solicitude, so that she should never be obliged to part with it, without her voluntary consent; and that decreeing against the husband in such case would lay her under a necessity to convey away her property, or suffer her husband to remain in gaol during life. After this, Sir JOSEPH JEKYLL was very explicit on the subject that the husband was bound by such a covenant, and decreed accordingly. The same doctrine was adopted by Lord ROSLYN, in 7 Ves., 474, and again by Sir WILLIAM GRANT, Master of the Rolls, in 7 Ves., 475. A case in Pr. in Chan., and one in Amb., 495, incline the other way: but the authorities that the husband was bound by such a *covenant and of such long [*113] continuance, we might have safely concluded that the law was settled. But Lord ELDON, in 8 Ves., 505-514, has shaken the authorities on this subject, by considering the question as unsettled, and by declaring that, before he should follow the two cases in 7 Vesey, he should pause. On general principles, there can be nothing that ought to release a man from performing his covenant, when he covenants that a third person shall do an act over whom he has no power to compel him to do it. Such a covenant would be good at law, on which the covenantee would recover damages. It is said, *arguendo*, that it was impossible for the husband to perform it, when his wife refused to join; but this is not that kind of impossibility which releases from the performance of a contract. It must be a thing impossible in the nature of things that renders a contract void. If A covenants with B that he will travel on a journey in the business of B with full speed, and that he would arrive at the end of his journey, it being one hundred miles, in one minute; such covenant would be void, on the ground of the impossibility of performance. But if A, on a valuable consideration, covenants with B to pay him five hundred dollars in one month: this is impossible to A, for he is not worth a cent, and cannot procure it; yet he is not released. This is not what is called a physical impossibility, but impossible only by reason of the particular circumstances under which A was. If A contracts to convey Whiteacre to B, when he does not own it, intending to purchase it, so

that he might fulfill his contract, and then find it is impossible to convey, because he cannot purchase; in such a case as this, recoveries have been repeatedly had at law. It is difficult to conceive why a court of chancery should refuse to interfere on any supposed hardship on the covenantor, who, with his eyes [*114] open, not suffering any * imposed hardship, no fraud being practised upon him, is willing to run the risk, and would be liable in an action at law on the covenant. It is true that an application in chancery would fall short of its aim, if the wife continue to refuse her consent. Nothing but a penalty would be inflicted in such a case, and of course the plaintiff would be no more benefited by an application in chancery than by a suit at law.

Although a married woman cannot convey her real property, otherwise than by fine, yet, if she had, previous to marriage, conveyed it to a trustee, in trust for any person, she will be compellable to convey to such appointee: so she may, before marriage, convey to the use of herself, with remainder to the use of such person as she shall appoint; and when she appoints, the appointee is entitled to property so conveyed. 2 Ves., 190.

In these States, the exception of a wife's capacity to convey, with her husband, her real property, obtains. The conveyance made by husband and wife of the wife's real estate may be by any of the ordinary modes of conveyance. There is, therefore, in this country, no room for the far-fetched presumption alluded to. (1)

If a wife, in England, should convey her real property by a fine or common recovery without her husband, if he did not afterwards disagree to it, she and her heirs would be bound, the coverture notwithstanding. (a)

In the case of her conveying her real property by fine, the idea of its being defective, on account of any possible coercion, (b) is laid aside: in this case we have only to inquire whether any right of the husband is affected by it: most certainly it deprives him of the usufruct of such property: therefore it is, that he

(a) Bro., tit. Femme, 33; 1 Co., 43; 1 H. Bl., 384; *Compton v. Collinson*.
 (b) 1 Ves., 229; Co. Litt., 3.

(1) See note to page 199.

may disagree to the conveyance, and render it void. By his disagreement to the conveyance of his wife, he restores to himself the freehold of such estate, which he holds in right of his wife, * during coverture; and, as the case may be, to the curtesy [*115] estate after her death, during his life: if his wife should die without having had by him a child born alive that could have inherited the estate conveyed, he could not, after her death, have avoided her conveyance; for, in that case, his marital rights could not be affected by it: if he do not dissent to the conveyance of his wife, he waives that right, and no person can complain.

If a *femme covert* convey her real estate to another, upon condition that the feoffee reënfeoff her when she demands it: if after coverture be at an end she demand the reënfeoffment, and the feoffee refuses, the condition is broken. Rol. Abr., 346. In this case there is no marital right affected which it is not in his power to restore; for he might have dissented, and this would have rendered it void; but as he did not, it is good.

The husband and wife are joined in a conveyance that the husband may convey his estate therein, which lasts at least during the coverture; and the wife joins, that she may transfer the fee. (1) If the husband had not any right which could be affected by the wife's conveyance of her real property, I conceive that it would not be in his power, because he is a husband, to prevent her from conveying effectually, without his consent. She can do no act without his consent, which in any way impairs his rights; but if no rights of his are impaired, there is no reason why his consent should be necessary; and of this opinion was the court, in the case of *Compton v. Collinson*, where the husband and wife articulated to live separate; (a) and the husband, in the articles, renounced all right to the usufruct of the lands of his wife; and she conveyed them by an ordinary mode of conveyance, without her husband being joined in the conveyance.

This conveyance was holden to be good, on the ground that the husband had * renounced all right to an interest in her lands, and therefore no right of his could be infringed. [*116]

(a) 1 H. Bl., 346.

(1) *Ela v. Card*, 2 N. H. Rep., 176; *Andrews v. Hooper*, 13 Mass. Rep., 472.

The opinion of the court, in this case, is manifestly founded on the fact of the husband's renunciation of his right. By his own covenant, he had abandoned the usufruct of his wife's real property; and remarkable are the words of the court, when speaking of the husband, viz., the authority which he acquires by his marital rights to direct and control her acts, is, by his covenant, in this instance, annulled. The basis, on which the court rested their opinion, was, that his right to control her contracts respecting her real property, was at an end, he having abandoned this right by this covenant; she might, therefore, contract as she pleased, respecting them, alone. So, too, for the same reason, if he covenant to surrender his rights to her person, she may so contract as to bind herself. Perhaps it will be asked, why do we not then find conveyance by wives of their real property, to take effect after the interest of their husbands has ceased? for, in such case, no right of the husband could be affected, and yet no such conveyances are known. I admit that there is no such practice known in England; and I also admit, that no right of the husband could be affected by such conveyance. The reason why we find no such case, is this: there is a stubborn maxim of common law, that must forever prevent such a practice, viz., that a freehold estate cannot by deed be created, to commence *in futuro*. If, therefore, a wife should convey her estate to any person in fee simple, or fee tail, or for life, when her husband's estate should therein end, it would be utterly void by force of this maxim. It is true, that the enjoyment of a freehold estate, by way of remainder, may be postponed until a particular estate therein has expired: as A may grant to B an estate for life, with remainder over in fee to C, and his heirs forever; in this case, C's enjoyment * of his estate, so given, is postponed until B's estate is at an end. It may then be asked, why may [*117] not a wife convey the fee, limiting it, by way of remainder, on her husband's estate for life therein? This she cannot do; for we are again met by another unyielding maxim of the common law: Every remainder, to be good, must be created at the same time, when the particular estate is created, on which it is limited; but, in the case put, the particular estate of the husband com-

menced on the marriage; and the remainder limited thereon by the wife arises afterwards. If it were not for the operation of these two maxims, I can see no reasonable objection that could be made to the conveyance of a wife, by fine, of her real property, the enjoyment of which was to commence when her husband's estate therein is at an end; for no marital right of his is affected by such conveyance: and her situation, as to coercion, is no consideration in law, when she conveys by fine. The maxim, that an estate of freehold cannot be created by deed, to commence *in futuro*, I apprehend, is not law in Connecticut; for we have a statute which declares that no estate, either in fee simple, fee tail, or any less estate, shall be given, by deed or will, to any person or persons but such as are in being, or the immediate descendants of such as are in being. This certainly implies, that an estate in fee may be given by deed, not only to persons in being, but also to their immediate descendants, who, at the time of giving the deed, were not in being. In this way a freehold estate may, by deed, commence *in futuro*. Our law has placed deeds and wills, in this respect, on the same footing; that which would be executory devise in a will in England, would be a good conveyance by deed here. That maxim being removed, I know of no reason, in Connecticut, why a wife may not convey her estate without her husband, to be enjoyed at some future period, so as it will not infringe * upon his rights; provided that future time is not extended beyond the limits prescribed [*118] by the aforesaid statute.

When real property comes to the wife, by devise or descent, it vests in her; and I have seen no case which supposes that the husband, by his dissent to accept it, can divest her of it; yet, when a wife purchases land, in the limited sense of that word, by her own contract, although the estate, by her purchase, vests in her, yet the husband may divest the whole estate, by his disagreement to it. This is not a case that will often happen, since, by the purchase, he is entitled to the usufruct, and the contract of his wife cannot be enforced against her; so, that in most cases he will reap a benefit from such purchase, without being exposed to any inconvenience. But his rights might be

affected, if he were compelled, against his will, to be tenant for life of the estate; for he would be compelled to pay taxes, support fences, &c., to prevent injury to others; and in case of permissive waste, he would be liable to the reversioner, which might be of more detriment than the estate was of advantage. (1)

It is consistent with the principles before laid down in this chapter, that he should have the power of dissenting from such purchase; and, in case of a lease to the wife, rendering rent, the case is still stronger, for the rent might often exceed the profits of the estate.

If a *femme covert* execute and deliver a deed of her real property, and, after the death of her husband, re-deliver it, this act establishes the deed; it is not necessary that it should be re-executed or re-attested. The ground on which the opinion of the court seems to rest was, that the delivery by her, when a *femme covert*, was utterly void; but after coverture ceased, she was competent to deliver the deed, which made it a valid deed. But [*119] was not the execution of the deed, during coverture, void? How, then, does the delivery of a void instrument render it valid? It seems to me that, as to real property, the deed of a *femme covert* is not void, but voidable; and the re-delivery, after coverture is at an end, is a ratification of this voidable instrument. Cowp., 201. (2)

(1) It is a well-settled doctrine that a *femme covert* may take lands by purchase, for this infringes upon no marital right of the husband, nor does it in any way prejudice his separate property. If he is silent with respect to the purchase, the law will presume it to have been made for his benefit, and he will be bound by it. If he does not wish to assent, the rule is that he must express his disagreement to the purchase. It should be borne in mind, however, that this is no infringement of the general rule, that a *femme covert* shall not bind herself by contract, for it is in her power, even though the husband should affirm the contract, to waive it after the determination of the coverture, and then she will not be bound. If the husband dissent from the purchase, it is held in England that he may maintain trover for the purchase-money. *Granby v. Allen*, 1 Id. Raym., 224: see, also, *Baxter v. Smith*, 6 Binn., 427; *Jackson v. Carey*, 16 John. Rep., 302.

(2) The deed of a married woman, except where the statutes of the State give her power to convey, is held to be absolutely void. See *Concord Bank v. Bellis*, 10 Cush., 276; *Thorndell v. Morrison*, 25 Penn., 326; and, also, note to page 199 *ante*.

*CHAPTER IX.

[*120]

THE WIFE'S EXECUTING A POWER. THE CONVEYANCE OF THE REAL PROPERTY OF THE WIFE BY THE HUSBAND. THE POWER OF THE WIFE TO WAIVE OR AFFIRM HER CONTRACTS AFTER COVERTURE. THE WIFE'S RIGHT TO ARREARAGES OF RENT OF HER LAND, INCURRED DURING COVERTURE. HER BEING RELEASED FROM ANY LIABILITY TO PAY RENT INCURRED DURING COVERTURE, BY FORCE OF A CONTRACT BEFORE COVERTURE TO PAY RENT. AND THE HUSBAND'S POWER OVER AN ANNUITY BELONGING TO HER BEFORE COVERTURE.

A MARRIED woman can execute a power or authority without her husband. If she have lands, as trustee for another, with power to dispose of these lands, she may execute this power by conveyance, and that without her husband. If she have power to dispose of them to whom she pleases, she may dispose of them to her husband.

It seems to be a doctrine not to be contested, that a wife may, without her husband, execute a naked authority, whether given before or after marriage; so, when lands are vested in her to convey, on a condition, she may convey. The reason given, why she may do this, by that very eminent lawyer, Mr. Hargrave, I apprehend to be a sound one; (a) and such as, if suffered to be operative in all cases of husband and wife, will lead to more just conclusions than are often found in many cases on this interesting subject. The reason given is, that her husband can receive no prejudice from her acts; but if his consent were necessary, great prejudice might arise to others. (1)

(a) William Jones, 127, 128.

(1) *Peacock v. Monk*, 2 Ves., 191; *Ela v. Card*, 2 N. H. Rep., 176; *Tyree v. Williams*, 3 Bibb, 368; 4 Bibb, 430. So where the wife has an interest in, and authority to execute the power, if the authority is collateral to the interest, she may execute it, because the authority and interest are as much disconnected as though they were vested in different persons. But where the husband and wife have a joint power to appoint the wife's estate by a formal deed, and they agree to

[*121] *I have laid it down as law, that if the legal title of land be vested in a wife, as trustee for others, that she can convey it to the *cestui que trust*, without her husband; yet it must be admitted that there has been a different opinion among judges on this point. (1) In the case of *Daniel v. Upley*, reported in *William Jones*, 187, Jones supposed that she could not, whilst *Whitelock* and *Doddridge* held she could. It seems to me that the latter opinion is correct, and in unison with the before mentioned opinion of *Hargrave*. What possible prejudice can there be to the husband, if her conveyance in such case is holden to be valid? True, indeed, if the maxim, that the wife has no existence during the coverture and is destitute of volition, be well founded, she could not. But these maxims equally militate against her power to execute a naked authority; but this power is not questioned. A married woman may be guardian; and her receipt, separate from her husband, is good. 13 Ves., 517. The conveyance of the real property of the wife, by the husband, operates only to convey his interest therein, although the deed of conveyance should be of the fee; and the wife or her heirs may enter thereon, on the death of the husband. And the case is the same if she joins with him in the alienation, unless it was by fine or common recovery, or a lease for three lives, or twenty-one years, in pursuance of the statute of *Henry VIII*; but if a wife, in this country, should join with her husband in any ordinary mode of assurance of her real property, she would be bound.

If an estate be conveyed to husband and wife, the wife, after the death of the husband, or her heir, may waive it. (2)

A leases to B and C, husband and wife; the husband commits waste and dies; the wife affirms the lease by occupying the land she will be liable for the waste committed by the husband: other-

sell it, the agreement is not binding upon the woman. *Martin v. Mitchell*, 2 Jac. & Walk. Rep., 425; and see also 4 Cruise's Dig., 20; Sugden on Powers, 148.

Under the Revised Statutes of New York, a married woman may execute a power, either by grant or demise, according to the authority given by such power. *Strong v. Wilkins*, 1 Barb. Ch., 9; *Wright v. Tallmadge*, 15 N. Y. (1 Smith), 307.

(1) 2 Kent's Com., 161; *Barnaby v. Griffin*, 3 Ves., 268.

(2) Bac. Abr., tit. *Baron and Femme*, 1: see *Jackson v. Carey*, 16 John. R., 302.

wise, if she waive the possession, as she may. When the wife joins with her husband * in such conveyance of her land, which does not bind her, she may, by an agreement [*122] thereto, after the death of the husband, render it valid: as where the husband and wife leased her estate for forty years, this contract did not bind her; and, after the death of the husband, she might enter thereon without any more impediment than if she had never leased it; but, on his death, she agrees to it; she renders the lease valid, and is entitled to the rent reserved, and all the arrearages of rent incurred in the lifetime of the husband. (a) (1) It is not easy to discover upon what principles she is entitled to the arrearages of rent: for, if the husband had leased it alone, it would have been a valid lease during his life, and he would be entitled to the rent which accrued during the coverture, and, on his death, his representative would be entitled to all the arrearages of rent which grew during coverture, the rent coming in lieu of the land; and how joining with the wife should, in this case, make any difference, it is difficult to understand, unless we consider the husband and wife joint-tenants of the lease, and the wife is then owner of the rent by the *jus accrescendi*.

It is laid down in the year book of 2 Henry IV, 19th page, that, if a lease be made to husband and wife jointly, rendering rent, if the husband die, and the wife agree to the lease, debt lies against her for all the arrears incurred during the coverture. That she may agree to the lease, and become thereby liable for all the rent which should accrue after the death of the husband, there is no doubt; but that her acceptance should render her liable for rent in arrears at her husband's death is opposed, as I apprehend, to the law of baron and femme in other cases. If a femme lessee, rendering rent, marry, and rent be incurred during

(a) 1 Roll. Abr., 340.

(1) Bac. Abr., tit. Leases and Terms for years, C. So, if husband and wife make a lease of the wife's land without any reservation of rent, this is a good lease by both during coverture, and the wife may affirm it after the dissolution of the coverture by acceptance of rent or bringing an action of waste. Cro. Eliz., 112. If the wife die after the dissolution of the coverture, the right to accept rent and affirm the lease will descend to her issue or heir. 3 Bal., 274; Roll. Rep., 403; 4 Cruise's Dig., 86, 87.

the coverture, although it was her own contract to pay the rent, yet * she is discharged, on the death of her husband, from [*128] paying the rent which accrued during the coverture, and the husband's executor is liable; for, as the husband has the sole benefit of the lease, the debt, by law, is transferred to him. The husband had, during the coverture, the exclusive benefit of the lease; he alone, therefore, is, by law, liable to pay the rent. (1) The wife may agree to any conveyance, after the death of her husband, which was made to them during the coverture, and is then liable to all charges to which such estate was subject: As in case of a lease to the husband and wife, rendering rent; if she agree, after her husband's death she must pay the rent reserved; or if husband and wife lease the land of the wife, for a certain rent, and she accepts the rent, after the coverture is at an end, it is evidence of her agreement to the lease. (a) If a woman be a lessee for life, or years, paying rent, and she marries, the rent in arrear, like other debts of the wife, remains the debt of the wife, and she must be sued with her husband; and in case of his death, before such debt is paid, she is liable, and not his executor; but for the rent in arrear during the coverture, the husband is alone liable: in case of his death, his executor is liable, and not the wife, for such rent in arrears. A principle is here found, which, perhaps, is not to be found in any other branch of our law. The creditor, without his consent, is compelled to change his debtor; and the wife, by marriage, is discharged from her covenant to pay the rent, which is incurred during the coverture, and the husband is substituted debtor instead of the wife. (b)

(a) Roll. Abr., 349; Co. Litt., 38.

(b) 1 Roll. Abr., 351; T. Ray, 6; 1 Lev., 38.

(1) As the wife, after the coverture is dissolved, may affirm or reject the lease, she, of course, stands in the position of an original lessor or lessee, to all intents, from the time of such affirmance; but as she is, by law, disabled from making any binding contract during coverture, it seems a contradiction in terms to say that, by her affirmance, she gives effect to the contract from the time of its original inception, and thereby subjects herself to answer for a cause of action accruing against her arising as contract, while it was entirely out of her power to contract. The correct doctrine is believed to be, that the affirmance is in effect a new contract, only imposing upon her the duties of lessor or lessee from the time of the affirmance.

In Roll. Abr., 848, it is said, if a lease be made to baron and femme, reserving rent, and rent be in arrear, the action may be brought against both. This rule is opposed to the principles which govern in the law of baron and femme. It is the duty of the baron alone to pay the rent; for he alone, during the coverture, has the benefit of the* lease. No point is better settled than this: that, where A leases to B, a *femme sole*, [*124] reserving rent, and B marries, no action can be maintained against B. It is a well-known singular feature in the law of baron and femme, that, by the marriage, the lessor is obliged to change his debtor; and no action will lie against the wife, on this lease, after coverture is ended by the death of the husband, for rent which accrued during the coverture; but the action must be brought against the executors of the husband; and, in case of a lease to a femme during coverture, the reason for her non-liability is, at least, as strong as in the case of a lease before coverture.

The husband, notwithstanding his power over the choses of his wife, cannot release a contract made with her, to take effect after coverture is at an end. If C contract with B that, if she will marry A, and should survive him, that he, C, will pay her £1,000, A cannot release C from this contract. And why should he have such power? He has no interest in that contract, and never can have. And so, too, in the case of an annuity to the wife, for the life of the wife, the husband is entitled to the avails of this annuity during coverture; yet he has no power to release it, if she survive her husband. If A should covenant with B, that he, A, would pay to C, who is a femme, a yearly rent, and C marries, her husband cannot release A from his covenant; for it is not made with him or his wife; neither has he any remedy to recover on the covenant. 8 Bulstrode, 29. (1)

(1) Where it appears, from the settlement of an annuity upon the wife, that it was intended for her separate and exclusive use, equity will give effect to the intention of the testator, and give to the wife the dividends of such her separate property. *Hartley v. Hurlie*, 5 Ves., 540; 18 id., 484. But the intention to deprive the husband of any benefit from the annuity must be clear, or he will be entitled to the interest. Thus, where a testator gave to his daughter, a *femme covert*, a legacy of £200 to be paid to her by his son, as follows, viz.: the interest to be paid to her annually during the existence of the coverture, and the principal sum to be paid to

The neglect of the husband may defeat the estate of the wife: as where the continuance of her estate depends upon her fulfillment of some express condition, which, if the husband neglect to fulfill, the estate of the wife is lost: (a) As if an estate be conveyed to the wife, before or after marriage, rendering rent, on condition to be void; if the rent be not paid according to the [*125] terms specified in the * conveyance, and the husband does not pay the rent as agreed, the estate is lost to the wife; but when he does not fulfill a condition in law, she is not prejudiced: As in case of a wife, lessee for life, or years; the husband neglects to perform the condition of fealty annexed by law to every such estate, but, on the contrary, sell the estate in fee simple, which works a forfeiture of his estate therein; but it does not prejudice her. (b)

[*126]

*CHAPTER X.

OF THOSE CASES WHERE THE HUSBAND MUST JOIN WITH THE WIFE IN A SUIT; AND THOSE WHERE HE MAY JOIN HER OR NOT, AT HIS ELECTION; AND OF THOSE WHERE THE HUSBAND AND WIFE MUST BE SUED JOINTLY.

OUR next inquiry shall be, in what cases the husband must join with his wife in a suit, and when he may join her or not at his election, and when a husband and wife must be sued jointly.

(a) Co. Litt., 246.

(b) Co. Litt., 123

her whenever she should become single, or to her heirs after her decease, it was held that the wife had not a separate estate in the interest of the legacy. *Fitch v. Ayr*, 2 Conn. Rep., 143. And a devise in trust, to sell, and out of the produce "to purchase in the trustee's name an annuity of £80 for the life of the wife of D, and to pay the same to her and her assigns," was held not to exclude the husband, though living apart from his wife. *Dakins v. Beresford*, 1 Chan. Cas., 194. So a direction "to pay to her, to and for her own use," or "to her own use and benefit," will not exclude him. *Jacobs v. Amyatt*, 1 Madd., 376; 3 Bro. Ch. Cas., 383. But a direction to a married woman "for her own use and at her own disposal," vests in her a separate estate; and a bequest to a woman of a fund, with the interest thereon, to be vested in trustees, the income arising therefrom to be for her sole use and benefit, vests the capital for her separate use. *Adams v. Armytage*, 19 Ves., 416.

In all cases where, on the death of the husband, the cause of action would survive to the wife, the husband and wife ought to join. (1)

(1) For statutory provisions of different States, as to the joinder of husband and wife, see note to page 191.

Where the cause of action accrued to the wife before marriage, the husband cannot recover in an action in his own name, without joining with his wife. *Morse v. Earl*, 13 Wend. Rep., 271. The husband of a *femme covert*, guardian in socage, must join with her in actions brought in her right as guardian. *Byrne v. Van Hoesen*, 5 John. Rep., 66; and a husband cannot be sued alone for the debt of his wife, contracted before marriage. *Angell v. Felton*, 8 John. Rep., 149.

The case of *Little v. Keyes and Tr.*, 24 Vt., 121, makes a clear distinction between a liability incurred by the wife before marriage and a cause of action accruing to the husband after marriage in relation thereto.

The case was *indebitatus assumpsit* for money paid by the husband, on a note signed by the wife, as surety, before marriage. It was objected that the action should have been brought in the name of husband and wife, and that it could not be sustained in the name of the husband alone. The court say: "It is evident that no right of action on this matter existed at the time of the marriage. There was simply a liability on her part, and which liability was afterwards imposed upon the plaintiff by his marriage. A right of action accrued only on the payment of the money in discharge of that liability. If the money had been paid by her before marriage, the cause of action would have accrued whilst sole, and she must then have joined in the action, as in case of his death the right of action would have survived to her. And possibly she might have been joined, if, after marriage, the claim had been paid from her separate estate. But where the right or cause of action accrues during coverture, as in this case, on the payment of the money in discharge of the debt, the husband may sue alone. So, if the right of action is inchoate before marriage and consummate after, he may sue alone or join the wife. In no case must she be joined except where the cause of action would survive to her. And as the money in this case was advanced by the husband in his own right, and in discharge of a personal obligation resting upon him, we do not see that the cause of action would survive to her on the death of her husband. It is manifest his personal release would have discharged this debt, on the ground that the legal interest in the contract was vested in him, and, having this legal interest, he can sustain this suit alone, citing, in support of the effect of such release, *Chitty on Plea*, 29; *McNeillage v. Holloway*, 1 Barn. & Ald., 224."

The doctrine of this case is sustained in *Pierce et ux. v. Dustin*, 4 Foster (N. H.) Rep., 417. It was held, in that case, that, when the undertaking is express to husband and wife, the consideration moving partly from the husband and partly from the wife, the wife may join with the husband in the suit; and *Norse v. Wells*, 4 Barn. & Ald., 739, was cited. But when the consideration moves partly from the husband and partly from the wife, and the promise is not express, but implied, the court say that the law would appear to be otherwise, and cite, in support of this

As in a case to recover lands claimed by the wife, (1) or in an action on a note of hand, given to the wife before mar-

latter distinction, *The Dippers of Tunbridge v. Wells*, 2 Wilson, 424. It was held, in *Magruder v. Stewart*, 4 How. Miss. Rep., 304, that, when the right of action would survive to the wife, she must be joined; when it would not, she must not be joined in an action by the husband.

With respect to the interest of a married woman in the distributive portion of a deceased person's estate, it was held, in *Henderson v. Guy*, 6 Stued. & Marshall, 209, that, if the same accrue after marriage, the husband may sue for it alone; and in the case of a legacy accruing to the wife, either before or during coverture, it was held in Massachusetts that the husband may sue in his own right. *Hagood v. Houghton*, 22 Pick., 480. But in Kentucky (13 B. Monr., 273) it was held that, in an action to recover the wife's interest in a residuary devise, the husband and wife must join.

In the case of *Borst v. Spelman*, 4 Comst., 284, it was held that, where an obligation is taken to the husband and wife, or to the wife alone, with the husband's assent, it survives to the wife as against the representatives of the husband; and this is the rule at law as well as in equity. And that in such case the form of the security implies a design on the part of the husband to benefit the wife, and the law will give effect to the intention where the interest of creditors is not affected.

And it was also held that, where the defendants had executed a receipt to a married woman, expressing that they had received various demands from her for collection, and agreeing to account to her when they should be collected, in an action had by her and her second husband, to recover the proceeds of the demands, that the receipt was evidence against the defendants either that the securities belonged to her in her own right or that the contract was made by them with her, with the knowledge and approbation of her husband.

In *Phillis Kirk and wife v. Plucknall*, 2 Maule & Selw., 393, a promissory note was made payable to a *femme covert*, and the court held that, *prima facie*, she was the meritorious cause of action. *Clancy's Married Women*, 3, 5, 6.

It was held, in *Hoy v. Rogers*, 4 Monr., that an obligation to a man and his wife survives to her on his death, and, on her second marriage, the action shall be in the name of her second husband and herself, by her new name.

(1) *Decker v. Livingston*, 15 John., 479.

In trespass, *quare clausum fregit*, husband and wife cannot maintain an action jointly, unless it appears that the wife had some interest in the close. *Meador v. Stone*, 7 Metc., 147.

Where a married woman had the actual possession of real property, held to her separate use, and was wrongfully ejected therefrom, she may, under the 114th section of the Code, maintain an action in her own name to recover possession. *Darby v. Callaghan*, 16 N. Y., 71.

Held, that, in an action under the Code to recover real property, corresponding to the former action of ejectment, when the wife is the owner of the fee, and the husband tenant by the curtesy initiate, the husband and wife may join in the action. *Ingraham v. Baldwin*, 12 Barb., 9.

riage; (1) or any contract made with the wife before coverture; (2) or any injury done to her property before marriage. (a) (3) As where her lands have been trespassed upon; (4) or her personal property injured or converted to the use of another; (5) or any injury to her person or reputation, either before or after marriage; (6) for, in all these cases, the property to be recovered (as in the case of land claimed by the wife, or debt, or damages in the personal actions), belong to the wife; and, if not reduced to possession, belong to the wife on the death of the husband. If the husband were to sue alone, and recover judgment in his own name, and then die, the law of husband and wife would not be preserved entire; for he is not entitled to her choses in action, (b) until they are collected; and there being a judgment in his name alone, it would go to his executor, and then the wife would be *deprived of her rights. But when the judgment is in the joint names of husband and wife, and the husband [*127]

(a) 1 Buls., 21; 1 Rol., 347; Buyl., 277; Cro. Eliz., 587; 1 Sid., 25; Cro. Car., 419; Yel., 59; 1 Brownl., 305; 1 Rol., 306.

(b) Cro. Jac., 506; id., 528; Cro. Car., 80.

(1) 1 Chit. Pl., 18: but it is said that the husband may sue alone on a bill payable to the wife before marriage, and not indorsed by her, for marriage absolutely vests the property in the bill in the husband. *McNeillage v. Halloway*, 1 Barn. & Adol., 218.

(2) 1 Chit. Pl., 18; 15 Ves., 495; Bac. Abr., tit. Baron and Femme, K.

(3) *Milner v. Milner*, 3 Term Rep., 627-631: *Mitchinson v. Hewson*, 7 id., 345; *Stroup v. Swarts*, 12 Serg. & Rawle, 76.

(4) 1 Chit. Pl., 18.

(5) *Milner v. Milner*, *ut supra*; *Spiers v. Alexander*, 1 Ruffin, 67. When the trover is before marriage, and the conversion after, they should also join. *Walker v. McLane*, 1 Murphy, 41; *Armstrong v. Simonton*, 2 id., 351.

Held, that a suit to recover damages for personal property of the wife, sold under execution as the property of the husband, should be brought in the name of the husband and wife, for the use of the wife, and not in the name of the wife alone. *Keeney v. Good*, 21 Penn., 399. A husband may maintain replevin for chattels belonging to his wife before coverture, without joining her. *Brown v. Fitz*, 13 N. H., 283.

(6) 3 Term Rep., 627; but if the husband has received special damage, he ought to sue alone. 1 Salk., 119.

A suit cannot be maintained by husband and wife for a libel on them both: there should be one action by the husband for damages to him, and one by husband and wife for the injury to her. *Hart v. Crow*, 7 Blkf., 351; *Bash v. Somers and wife*,

dies, it goes to the wife, of course, as the law intended. (1) The rule here laid down I take to be an unyielding rule. I know that it is often laid down in elementary writers, that a debt due to the wife before marriage may be sued for by the husband alone: it has been so said by judges, and frequently by counsel; but I apprehend there will not be found a single adjudged case to warrant the position.

In case a note, bond or legacy be given to the wife during coverture, the husband may sue alone: this rule is questioned by none; and it will be found, upon examination, that the cases cited to prove that the husband may sue alone for a debt due to the wife, are such as arose during the coverture. The case of *Howell v. Muir* (a) is cited for this purpose; but that was the case of a bond given to the wife during coverture. *Allyn's Reports* is also cited; which is also a bond given to the wife during coverture. (b) A case in 2 *Levins* is also cited. This proves nothing, but that the husband may join his wife if he chooses when her property was trovered before marriage, and

(a) 3 *Lev.*, 408.(b) *Allyn's Rep.*, 86.

20 *Penn.*, 159; *Gazyuski v. Colburn*, 11 *Cush. (Mass.)*, 10. For special damages in slander, the husband must sue alone. For words actionable *per se*, he may join the wife. *Williams v. Holdridge*, 22 *Barb.*, 396; *Beach v. Ranney*, 2 *Hill*, 309; *Tallmadge v. Grannia*, 20 *Conn.*, 296; see, also, *Kleim v. Hentz*, 2 *Duer (N. Y.)*, 633; *Wilson v. Goit*, 17 *N. Y. (3 Smith)*, 442. But, by a provision of ch. 60, p. 157, *Laws of New York*, of 1860, the wife may maintain an action in her own name, for injury to her person or character, against any person or body corporate, and the money obtained on any settlement of such a suit, or on judgment rendered in her favor, is her separate property.

Husband and wife cannot join for the battery of both. The battery of the husband is a distinct cause of action. *Chapman v. Hard*, 2 *Brev.*, 170. But for a battery committed upon the wife, the law requires that the husband should join the wife in bringing the action, and the defendant cannot mitigate the damage done to the wife by mere proof of some act or word of the husband in which the wife did not participate. *Dougherty v. Randall*, 5 *Gibbs' (Mich.) Rep.*, 581, 1856.

In an action against husband and wife for an assault and battery, when the evidence shows that the wife was the principal and only offender, it is clearly a case to be submitted to the jury: the action is joint and several in its nature. *Wagner v. Bills*, 19 *Barb. (N. Y.)*, 321; *Smith v. Taylor*, 11 *Geo.*, 20; *Roadcap v. Sipe* 6 *Gratt.*, 213.

(1) *Co. Litt.*, 351, note (1); 2 *Black. Rep.*, 1236.

converted afterwards. It implies, indeed, that he may sue alone. Of this there can be no question. For, by the marriage, the property, not being converted at that time, vested in the husband (a), and was his absolutely if it had been converted before: so that nothing remained in the wife but a right of action for damages. This would have been a chose, to recover which, husband and wife must have joined. (1)

(a) 2 Lev., 107.

(1) The wife cannot be joined upon a mere personal contract arising during coverture. *Jackson v. Vanderheyden*, 17 John. Rep., 271. If a bond be entered into by baron and femme, the baron may sue it alone, and he thereby shows his dissent to his wife's taking anything by it; 1 Strange, 229; and even though it be entered into by the wife as administratrix. *Ankerstein v. Clarke*, 4 Term Rep., 616. But when a bond is given to husband and wife, conditioned for their separate maintenance, during their joint and several lives, they may join in a suit upon it. *Schoonmaker v. Elmendorf*, 10 John. Rep., 49. They may also join on a promissory note, made to the wife during coverture. *Philliskirk v. Pluckwell*, 2 Maule & Selw., 393; *Lewis v. Martin*, 1 Day, 263; though this seems to conflict with the doctrine in the case of *Jackson v. Vanderheyden*, in the 17th of Johnson. The better opinion seems to be, that, in these cases, where the wife is not the meritorious cause of action, she should not join with her husband. 1 Chit. Pl., 19.

The wife can be joined with the husband only when her interest existed before coverture, or when she is the meritorious cause of action, and the promise is to her, or when the action is in *autre droit*. *Lee v. Chambers*, 1 Strobbart, 112; *Gay v. Roberts*, 18 Vt., 342; *Morris v. Booth*, 8 Ala., 907. The husband and wife may join in a suit to recover a debt belonging to her alone, under the statute of Pennsylvania, of April 11, 1848. *Goodyear v. Rumbaugh*, 13 Penn., 480; *Hertzog v. Hertzog*, 29 id., 465. In an action on contract between two married women, made during coverture, neither wife should be joined. *Williams v. Coward*, 1 Grant's Cases (Penn.), 21. A married woman may, in New York, maintain an action on a promissory note given her during coverture, the consideration of which was money of the wife, which had never been in possession of the husband, and was loaned with his consent. *Smart v. Comstock*, 24 Barb., 411. She must sue alone when the action concerns her separate property, under the Code. *Ackley v. Tarbox*, 29 Barb., 512, and cases; *Darby v. Callaghan*, 16 N. Y. (2 Smith), 71.

When the statutes of a State allow a married woman to bar her dower, by becoming a party to her husband's deed, but do not make her liable on the covenants, she is not properly a party for a breach of covenant. *Griffin v. Reynolds*, 17 How. U. S., 609.

On a joint note executed by husband and wife after marriage, the husband is liable in an action against him alone. *Henry v. Hickman*, 22 Ala., 650.

In a late English case, *Fairhurst v. Liverpool Loan Association*, 26 Eng. Law and Eq. Rep., 393, the court held that, although a married woman was liable for her

The case in *Vernon*, often noted as a case proving that the husband may sue alone for a chose due to the wife before marriage, is the case of a legacy given to her during the coverture, to recover which the husband has a right to sue alone. For the same purpose, a case in *Atkins* has been mentioned, but not a syllable will be found * there to support such an idea. [*128] The case of *Garforth v. Bradley*, in 2 *Ves.*, is also cited for the same purpose. (a) This case is an authority to prove, that as to debts due the wife before coverture, the husband must join her in the suits to recover them. The words of the Chancellor are: "Whenever a chose in action comes to the wife, whether vesting before or after marriage, if the husband die in the life of the wife (b) without reducing it to possession, it will

(a) 2 *Ves.*, 676.

(b) 2 *Mod.*, 217.

torts, and, therefore, frauds committed by her during coverture, yet, when the fraud connected with a contract made by her, is the means effecting it, and connected with the contract, no action can be sustained against them or her. In this case, a married woman persuaded a person to lend money to another, on her security. She represented to such person that she was a *femme sole*. The court say, after premising that a *femme covert* is incapable of binding herself by contract: "But she is undoubtedly responsible for all torts committed by her during coverture, and the husband must be joined as a defendant. They are liable, therefore, for frauds committed by her on any person, as for any other personal wrong. But when the fraud is directly connected with the contract with the wife, and is the means of effecting it, and parcel of the same transaction, the wife cannot be held responsible, and the husband be sued for it together with the wife. If this were allowed, it is obvious that the wife would lose the protection that the law gives her against contracts made by her during coverture; for there is not a contract of any kind, which a *femme covert* could make, whilst she knew her husband to be alive, that could not be treated as a fraud; for every such contract would involve, in itself, a fraudulent representation of her capacity to contract;" and cite *Cooper v. Witham*, 1 *Lev.*, 247.

The rule that the husband is liable for the torts of the wife, committed during coverture, appears to be as well established in this country as in England. *Wagner v. Bills*, 19 *Barb.* (N. Y.), 32. This rule applies to torts committed before marriage. *Hawks v. Hamar*, 5 *Binn.*, 43; *Knox v. Pickett*, 4 *Doss.*, 92; *Palmer v. Wakefield*, 3 *Beav.*, 23; *Cox v. Hoffman*, 4 *Dev. & Batt.*, 180. But with this distinction between contracts and torts before marriage, to hold him upon contracts of the wife, entered into while sole, it is only necessary that she should be his wife *de facto*. *Norwood v. Stevenson*, *Andr.*, 227; *Tracy v. McAlton*, 7 *Dowl. P. C.* 532; whereas, for tort, while sole, she must be his wife *de jure*. *Ourhalt v. Ellswell*, 1 *Ashm.*, 200.

survive to the wife with these restrictions: as to those which come to her during the coverture, the husband may sue for them alone. This proves that he could not bring an action for those that came to the wife before coverture, without joining the wife: as to those choses that come to the wife before marriage, he has no election to treat them as his own; they belong to his wife, and must be sued for in her name as well as his: as to those which come to her after marriage, he has his election to treat them as his own or not, and he may sue in his own name, or he may join his wife. The position, then, is, as to all her choses that belong to her before coverture, if a suit be brought to recover them, it must be in the name of husband and wife."

The case of *Fenner v. Plashet* has been urged as proof that, for a debt or duty, owing to the wife before coverture, the husband may sue alone. The case was, that a rent-charge in fee was granted to Fenner's wife when sole; she married Fenner, who distrained for rent due whilst his wife was a *femme sole*; the distress was rescued, and Fenner brought the action in his own name, without joining his wife, and it was holden that he might. This decision was doubtless correct, for by 32 Henry VIII rent in arrear due to the wife while sole is given to the husband, so that the wife has no interest therein; and on his death it will not survive to the wife, but will belong to his executors. It was, therefore, proper to sue in his name* alone; [*129] he might, indeed, have joined his wife if he had chosen so to do, for her property was the meritorious cause of the action. (1)

When a chose due to the wife before marriage is sued, why may not the wife bring her action in her own name? for, in that case, if the chose be collected during the coverture, the avails will belong to the husband; and if the husband should die before

(1) This doctrine is held in several of the older cases; but the reason for suffering the husband to sue alone is, that the rescue is a tort to the husband himself, which in no wise breaks in upon the established principle that, for any cause of action accruing to the wife before coverture, they must be joined; *Cro. Eliz.*, 459; *Moor.*, 584; but the wife might have been joined, for it arises upon a duty due to her before coverture. *Cro. Eliz.*, 459.

it is collected, it will belong to the wife; and if judgment be recovered, and the husband die, the judgment, being in the name of the wife, will belong to her; and thus the rights of husband and wife are preserved unhurt. The answer often given to this question, by the elementary writers, appears to me to be very unsatisfactory. That the wife is disabled to bring a suit in her own name, without her husband, (unless in the excepted cases before considered in these chapters,) is undoubtedly law; and we are told that coverture itself is a disqualification. If this be a sound position, the excepted cases cannot be supported; yet some of them are admitted by all men to be good law. Neither would it be correct to say that coverture must be plead in abatement by the defendant, (a) if he means to avail himself of it: and yet this point has been so decided, and is considered as law. Whereas the idea that a disqualification to sue alone results from a state of coverture would render any judgment in her name utterly void, or at least erroneous, and of course might be shown by the defendant in any part of the proceedings. When the defendant prevails, in a plea of coverture, she shall have an execution for cost in her own name, or the husband may sue a *scire facias* on the judgment. Doug., *Worley v. Rayner*.

It is said, that it is absurd that she should sue alone, for that the husband and wife are one person in law. If this metaphorical language have any application to this subject, it will prove that he can never sue in his own name alone. It is said that her existence, at least, for * civil purposes, is suspended during [*180] coverture; and yet we find her often an active agent, executing powers, conveying land, suing with her husband, and liable to be sued with him, and liable to punishment for crimes. The true reason is, that it would be unreasonable that the defendant should be vexed with a suit by a person who was unable to respond any cost that the defendant might recover in a false suit against him. The whole of the wife's property is at the disposal of the husband: the usufruct of all her real property, and all her personal services, belong to him; so that, by marriage, she is deprived of the means of satisfying any demand

(a) 3 Term Rep., 697.

against her: therefore the husband ought to be joined. There is also the additional reason, that no judgment ought to be rendered against the wife alone, so as to expose her to imprisonment without her husband. When the cause of action does not survive to the wife, on the death of the husband, there is no necessity that the wife should be joined with the husband, as an *assumpsit* for labor of the wife after coverture; for, in this case, the wife has no interest. (1) It belongs exclusively to the husband; for he is solely entitled to the avails of her services. So, too, when there is an express promise to the wife after coverture the action may be brought by the husband alone; for such promise is considered as a promise made to him. (2) The case is the same in an action on a bond given to the wife during coverture. (a) (3) So, too, in case of a trespass on the wife's land, which affects the usufruct only, as taking the emblements; for these injuries do not survive to the wife. But if the injury affected the inheritance, they ought to join: (b) as where there is a destruction of a house or timber growing on the soil; for these are injuries which survive to the wife. (4)

The husband need not join the wife in an action of debt incurred during coverture, upon a lease given by * the wife before marriage; for this belongs to the husband, [*131] coming in lieu of the usufruct: and, for the same reason, the wife need not be joined in an action to recover rent accruing on a lease of the wife's lands by the husband and wife, (c) which lease was made previous to the statute of Henry VIII. (5)

(a) 4 Mod., 156; 1 Salk., 114; Cro. Jac., 77; 1 Roll., 318-347.

(b) 3 Lev., 408; Ver., 82.

(c) 1 Buls., 21; Palm., 207.

(1) 1 Chit. Pl., 19.

(2) Cro. Eliz., 66. He may sue alone, or the wife may be joined. 2 M. & S., 393, 396; 4 T. Rep., 616; 1 Salk., 114; 1 H. Black., 114.

(3) 3 Term R., 626, 631; 1 Chit. Pl., 63; 2 H. Black., 1236; Cro. Car., 418.

(4) Bac. Abr., tit. Baron and Femme, K; 1 Chit. Pl., 64.

(5) And it makes no difference in this respect whether the lease of the wife's land be made before or during coverture. In either case, the husband may join the wife, or may sue alone, at his election. 1 Chit. Pl., 20; Decker v. Livingston, 15 John. Rep., 479.

Neither need he join his wife to recover rent in arrears to her, before coverture, since the enacting the statute of Henry VIII, giving such arrears to the husband. It would seem as if the line of distinction here presented (a) would exclude the wife from being joined with the husband, when she has no legal demand which could possibly avail her anything; yet the husband may join his wife in a variety of cases in which he is not obliged so to do: as where the person or property of the wife is the meritorious cause of action, and the declaration does not demand the damages as especially belonging to the husband, as for rent of the wife's lands, incurred during coverture. This rent is indisputably the husband's, and never can belong to the wife; for, if it be in arrear, at the time of the husband's death, (b) it belongs to his executor: yet the husband may join the wife: so he may in case of an *assumpsit* to his wife, (1) or legacy given to her

He may join the wife in an action of trespass on emblements growing on the wife's land; (c) and this may be done where property was trovered from the wife before marriage, and converted afterward. By the marriage the property was absolutely vested in the husband, and there could be no necessity of joining the wife; yet the law allows it to be done. (2) If the husband and wife should obtain judgment in such case, and the husband should die before the collection of the money recovered by the

(a) Cro. Jac., 305.

(b) Cro. Jac., 305; 1 Vent., 169; id., 88.

(c) Cro. Jac., 443; id., 696-698.

(1) But this action cannot be supported without an express promise to the wife. *Heydon v. Thomas*, 1 Har. & Gil., 153.

And a judgment cannot be rendered in a court of law against a married woman, on a promissory note made by her husband and herself. *Davis v. Foy*, 7 Sm. & Marsh., 64; *Boach v. Randall*, 45 Maine, 438.

(2) 1 Ohlt. Pl., 62. In some of the older cases it is said that he may join the wife at his election. *Sid.*, 172; *Keb.*, 641. But 3 Term R., 674, is strong to the point that they must join in such cases. In replevin, detinue, &c., the husband may sue alone, for these actions admit a property in the femme at the time of the marriage, which, by virtue of the marriage, becomes vested in him.

The weight of authority is strongly in favor of the opinion that, under the New York Code, the husband and wife cannot maintain an action in their joint names in reference to the wife's separate property. *Ackley v. Tarbox*, 29 Barb., 512, and cases; *Darby v. Callaghan*, 16 N. Y. (2 Smith), 71.

judgment, the wife would own the judgment by survivorship; and thus the law of husband and wife, respecting such property, would seem not to be preserved entire.* Where the *jus accrescendi* prevails, no question can arise; the wife is, [*182] undoubtedly, the sole proprietor of such judgment, and not accountable to any person in law or equity. But, in those States where the *jus accrescendi* is not acknowledged, it may be a question whether the wife is not trustee of this judgment for the executor of the husband, and obliged in equity to account, if not for the whole of the judgment, at least for a moiety. I should incline to this opinion were it not that there is a different point of light in which, I apprehend, this transaction may be viewed. I can conceive of no reason which could influence the husband to join the wife, only that she might have the benefit of the judgment in case of his death before the money was collected; and, if this be the case, it is in the nature of a voluntary gift of this money to his wife upon the happening of his death, and, of course, cannot be taken from her by his representative. This, like all other voluntary grants, would not be good against creditors. Notwithstanding the before-mentioned cases furnish evidence of the truth of the position that the husband may join the wife where she is the meritorious cause of the action, yet this rule does not extend to those cases which demand damages on the ground of special damages to the husband: as where an action is brought to recover for the battery of the wife (a) *per quod consortium amisit*, or on account of some special damages to him by reason of slandering his wife. In these cases, the husband must sue alone; for it is easy to see that it would be absurd to join the wife. (1) All the cases of contract where the husband is permitted to join the wife, when he might have sued alone, are cases of express promises to the wife. We find it said

(a) Cro. Jac., 501; Balk., 306; 1 Lev., 140; Sid., 346.

(1) For the action is founded on the special damage done to the husband, and it was so adjudged in Cro. Car., 89, 90, and in Cro. Jac., 538; and wherever the action is brought for words spoken of the wife, and predicated on the special damage done to the husband, she must not join, Bac. Abr., tit. Baron and Femme, K, and cases there cited; Lewis et ux. v. Babcock, 18 John. Rep., 443.

See note 5, page 215.

in Carth., 251, that the law will not imply a promise to the wife, although her services are the meritorious cause of the right of action; and, in such case, the husband must sue alone. 4 Mod., 156, is an authority * to prove that, on an implied contract [*188] for work done by the wife, the husband cannot join the wife. (1)

In the case of *Bright v. Addy*, in 2 Vent., 195, the judges differ respecting the question whether the wife could be joined in an action of trespass, *quare clausum fregit*, on the land of the wife. The decision of the question, I apprehend, depends upon the nature of the injury. If the trespass affected the inheritance, by doing damage to the houses, destroying the trees, or ploughing the soil, she ought to be joined; for, in such cases, the action would survive to the wife on the husband's death. But if the injury was to the emblements, it would not be necessary to join the wife; for such cause of action would not survive to her; yet her property being the meritorious cause of action, the husband has his election to join her or not. (2)

In Sid., 25, we find it said by the court, in a case where a promise was made to a *femme covert*, in consideration that she would cure such a wound, to pay her £10, that, if the baron die, such cause of action would survive to the wife. (3) This is

(1) The doctrine was long since established that assumpsit would not lie upon an implied promise to the wife, for any cause accruing during coverture. In addition to the cases cited in the text, see Cro. Eliz., 61; Salk., 114; Style, 298; *Heydon v. Thomas*, 1 Har. & Gill, 153.

(2) The rule, as laid down by Mr. Chitty, on this subject, is, that where the action is merely for the recovery of damages to the land, or other real property of the wife, during coverture, or for a tort which prejudices a remedy by husband and wife, the husband may sue alone or the wife may be joined, her interest in the land being stated in the declaration. But a demand for removal of personal property, as corn or grass, when severed from the land, ought not to be included, because the entire interest in the personalty is vested in the husband. 1 Chit. Pl., 63; and see *Selwyn's Nisi Prius*, 291; 5 East.; 2 Bla. Rep., 1236; Cro. Car., 418, 437.

(3) In Bacon's Abridgment this case is cited, and held to be good law, upon the ground that it is a promise arising upon the skill and performance of the wife. Bac. Abr., tit. Baron and Femme. K. It is not easy to discover wherein this case differs from the ordinary one of an express promise to the wife, where it is well settled she may join, and therefore the action may have been rightly brought, but it is much more difficult to assign the principle upon which such a cause of action would survive to the wife.

analogous to some modern cases, where a legacy was given to the wife during the coverture, and not collected, and the baron died; the right to recover it survived to the wife. It is difficult to discern the principles on which such decisions are founded; for there can be no question but that the husband may sue without his wife, and recover all the choses of the wife which accrued during the coverture; and in the principal case, the husband was exclusively entitled to the services of the wife. It is true, that, by the courtesy of courts, where there is an express promise to the wife the husband may join the wife; but, in such case, it is not because the wife has the smallest interest therein.

In Cro. Jac. it is stated that she may be joined; and this must be the correct opinion; for nothing is more * clear than [*184] that the husband is entitled to all the earnings of the wife. Of course, the action would not survive to her, and there could be no necessity of joining her.

There is a case reported in 2 Levinz, 68, of an action on the case against baron and femme, for retaining and keeping the servant of the plaintiff, and judgment for plaintiff against both. Surely there is no case, except this, of an action having been maintained against a *femme covert*, upon a retainer on contract. If it be viewed as a trespass (which it cannot be), it is then a tort committed with the husband, for which the wife is not liable. There is no principle on which this case in Levinz can be supported.

In Oro. Car., 899, there is a case of an estate in reversion, granted to baron and femme for life, and the heirs of the baron in fee. The baron brought an action, in his own name, against the tenant, to recover damages for not repairing the house, according to the covenants of his lease. It was objected that the suit ought to have been in the name of both baron and femme, as both had an estate therein; but the court held that it was well brought. The words of the court are: The action being personal for damages only, it might be brought in his name alone. The judgment, that the action is well brought, is correct; but not for the reason given. The truth is, no estate is given to the wife: it is not an estate for life in the husband and wife, with

remainder in fee to the heir of the baron; for, according to the well-known rule in Shelly's case, where an estate is given to A for life, and the terms "his heirs" are used, it is a fee simple in A. The word "heirs" is a description of the quantity of estate given. Of course, in this case, the husband took the whole estate in fee, and the wife took nothing; so that the suit could not have been brought in her name, together with his. If the action will survive against the wife, in case of the * death [185] of the husband, it must be brought against husband and wife, as to recover land claimed by the wife. When a suit is brought to recover lands of which husband and wife are in possession, the husband claiming in right of his wife, the suit must be brought against husband and wife: yet this does not extend to the case when the husband disseises the tenant, claiming in right of his wife; for his act cannot make her a disseisor: and no consent of her own to the act will bind her: but her agreement to the disseisin, after her husband's death, will constitute her a disseisor; and her remaining in possession, and taking the profits, is conclusive evidence of such agreement, if she had knowledge of the disseisin. Bro. Disseisor, 67; Roll. Abr., 660. (1)

Though a wife is not bound by any assent of her own, yet she is liable for her torts; so that, if she should enter upon land without her husband, and disseise the tenant, she would be a disseisor, and although, in that case, the husband is no disseisor, yet, if an action is brought by the tenant during the coverture, the husband is liable with the wife. It is also said, that, if a wife, with her husband, enter and commit a disseisin, that she is a disseisor, and liable with her husband. The general rule is, that, when a wife commits a wrong in company with her husband,

(1) And where a lease for life or years is made to baron and femme, reserving rent, the action of debt for rent in arrear should be brought against both, for this is for the advantage of the wife, and it has been held that a *femme covert*, though living apart from her husband, and on her separate estate, could not be sued without joining her husband. *Brown v. Killingsworth*, 4 McCord, 429; and when the wife was a yearly tenant before marriage, at a rent payable quarterly, and she married before a quarter's rent became payable, it was held that, in an action to recover such rent, the wife should be joined. 3 J. B. Moore, 307; 1 Brod. & Bing., 60.

she is not liable to any action, but the husband only. The reason of the exception in this case must be, that the wife gains an estate by the disseisin, as well as the husband; that is, the husband and wife, have a joint estate by the disseisin. So that, having the benefit of the tortious act, she ought to be liable; but a wrong act respecting property, where, from the nature of the property, she can never receive any benefit, or any wrong act that is not beneficial to her, if committed with her husband, shall never render her liable to an action. Co. Litt., 357; Roll. Abr., 660.

*So, too, for all debts which she owed before coverture, she must be sued with the husband; (1) for, if these be [*136] not collected of the husband during coverture, she is liable. She is considered by the law the debtor; and for all torts committed by her before marriage, and for all torts committed by her after marriage, where she was not in his company, or did not act by his coercion. (a) (2) But for covenants in leases respecting repairs and rents that accrued after the marriage, she cannot be made liable; for the obligation that arises under such a contract, is transferred to the husband.

Husband and wife cannot join in an action for the battery of both; for the damages of the battery done to the husband belong to him; and for the battery of the wife, like choses, if collected during the coverture, they will belong to the husband; but if not, they will belong to the wife, or her administrator. (b) Such a transaction furnishes cause for two actions; one by the husband

(a) 1 Roll., 6; Co. Litt., 357; 1 Roll., 348; 1 Lev., 312.
(b) 2 Vent., 29; Cro. Jac., 668.

(1) Angel v. Falton, 8 John. Rep., 149; Bac. Abr., tit. Baron and Femme, K; 1 Chit. Pl., 45; 7 Term Rep., 348; 2 id., 480; 1 Taunt. Rep., 217, 254; 1 Brod. & Bing., 60.

(2) 7 Mass. Rep., 291; 1 Bing., 50. An action for slander by the wife, *dum sola* will lie against husband and wife. Hank et ux. v. Harman et ux., 5 Binn., 43. And, it has been held that, for a forfeiture under a penal statute, they must be jointly sued. 1 Hawk. P. O., 3, 4. But the Supreme Court of the State of New York have held that the husband may be sued alone for such forfeiture. Hasbrouck v. Weaver, 10 John. Rep., 256.

for the injury done to him; and another by the husband and wife for the injury done to her. (1)

If husband and wife be sued for a battery, and the husband be found not guilty, judgment cannot be rendered against the wife alone, although she is found guilty; for she is not liable to an execution without her husband. (a) It is said that, in an action by husband and wife for a battery of both, and the defendant is found not guilty as to the husband, and guilty as to the wife, that such a verdict is good; or, if several damages had been found, and the husband had released the damages to himself, that this would be good. (2)

A *femme covert*, having a separate maintenance, may sue without her husband. This proposition is not correct, unless there were articles of separation. 135 Chan. Ca., 35.

(a) 1 Vent., 323.

(1) Cro. Car., 553; Jones, 440; Cro. Jac., 355; Roll., 108; 2 Mod., 66; 8 id., 290; Vent., 323; and a marriage *de facto* will be sufficient to entitle them to join, unless the marriage were void *ab initio*, as in the case of polygamy. Doug., 174. If the action is brought for the personal suffering or injury to the wife, the declaration ought to conclude to their damage, and not to that of the husband alone, for the damages will survive to the wife if the husband die before they are recovered. Id. Raym., 1208; Salk., 119; Yelv., 89. But if the wife die after judgment, the damages will survive to the husband. *Stroop v. Swartz*, 12 Serg. & Rawle, 36. And if the battery of the wife deprive him of her company or assistance, or if the wife be maliciously indicted, and the husband be put to expense, he may sue separately for such consequential injury, and in the same declaration proceed for an injury done to himself. 1 Chit. Pl., 62, and authorities there cited.

(2) But if a woman marries after an interlocutory judgment against her, in an action for a trespass, or on a contract, the plaintiff may proceed to judgment and execution against her, without joining her husband, by a *scire facias*. 3 Bl. Com., 414; *Cooper v. Hunchin*, 4 East's R., 521.

* CHAPTER XI.

[*137]

OF THE POWER OF THE WIFE TO DEVISE.

By some it is contended that there is an incapacity at common law in a married woman, resulting from a state of coverture, to devise her own property. On the other hand it is contended, that, at common law, wherever we find a wife possessed of property, she may as freely devise it as any other person, provided no right of her husband will be infringed by such devise.

In the first place, I will consider this subject independent of any authorities; as if it were a question wholly novel, respecting which there had been no adjudications, and was now to be decided upon principle. In such case, unshackled with precedents, nothing can govern us, in deciding the question, but what is reasonable and right, preserving, however, a due regard to all analogous principles of law; so that the determination in this case shall not be inconsistent with such principles; if the result of such investigation should be, that it is reasonable that a married woman should possess the power of devising.

Yet, if the authorities teach a different doctrine, I admit that nothing more can be inferred from this, than that the law, in this particular instance, is unreasonable; but still a court must decide against such power. No maxim is of more real utility to the community than *stare decisis*. If it should be found a dubious, embarrassed question, we can never fail to decide on that side which is reasonable and right.

* Surely there is nothing in the nature of marriage that should prevent a woman from devising. Her understand- [*138]
ing is not impaired thereby; and she, who was sufficiently discreet to devise when unmarried, is not, by marriage, rendered less discreet. Some maxims in use would lead us to believe that she was destitute of volition. If this be indeed true, a devise by her ought not to have an effect, any more than a devise by a fool or a madman: but surely the English law does not recognize such a principle. Upon what ground is it that a married woman is

punished for her crimes? It is a fundamental maxim of that law, that free-will is essential to a subject deserving punishment; and to punish a person destitute of it, would be a reproach to the law. Is she not often vested with a power to convey and devise? and the execution of this power is as effectual, as if made by any other person. This would be absurd upon the principle that she is incapable of exercising any volition. Is it not true, that, by a certain species of conveyance, she can convey her real property; and that her consent is absolutely necessary to perfect the conveyance; and, when that is done, it shall bind her? It is a solecism to say, that the consent of a person shall have any efficacy who is incapable of consent. In an action, by a husband for adultery with his wife, some solemn sage of the law framed the writ, that the defendant, with force and arms, ravished his wife; and this is surely correct, if a married woman cannot consent to commit adultery. On what ground then is it to be contended that she ought not to have this power? It is urged, with an appearance of plausibility, that such a power would be of no advantage to her, but a real disadvantage; that she is liable to the coercion of her husband; and it is apprehended that he will compel her to devise in such a manner as suits his interest, without attending to her wishes.

May not the same argument be *urged, with equal force [*139] against her power to convey her estate? Cannot a conveyance be procured by the same coercion as a devise by will? The husband, who regards not the wishes of a wife, if he be determined to get her estate into his hands, will, by the same mal-treatment, render her life uneasy, until he has accomplished his designs, and gotten the avails of her property, by compelling a sale; and a wife, who has firmness sufficient to prevent her yielding to the importunities of her husband to sell her property, will devise according to her own choice. The argument is, that, as the law confessedly is, there is the same danger that her inclinations respecting her property will be defeated, as if she possessed the power of devising. Will it be said that he has more power over her when in a sick bed, than when in health? This reasoning does not oppose her devising, when in health: it

proves, rather than anything else, that sick bed devises are dangerous. It may also be said, that a husband, on a sick bed, may be led away, contrary to his inclination, by the importunities of a wife: for he is, in his turn, in her power. If then, a deed by her, of her real estate, which may be procured by coercion, is legal, why is not her devise, that may be procured by the same coercion? To deprive her of this privilege, will, in no instance, render her situation eligible: and, to allow it, will, in very many instances, afford her the satisfaction of knowing that her estate will, probably, be enjoyed by the object of her affections. I shall make no observations respecting that imaginary guard, which the English law seems to have placed over her interest, by examining her privately, respecting her consent to a conveyance; for it can be no guard. The wife who is unwilling to convey, and who has so far yielded to the importunities of her husband, as to proceed in the business, will never stop short on such an examination; for she would not have appeared before * the [*140] magistrate, if she had not resolved to secure her quiet at the expense of the loss of her estate. There is no instance, I apprehend, where a wife has been examined, in which she has declared that she was unwilling to convey: it is less than the shadow of a security. If, then, she may convey with his consent, why not devise with his consent? In the form there is this difference: in the instruments of conveyance, he is joined with her, but not in a devise. In the former it is necessary for him to join, to pass his own interest; but, in the latter case, his interest is not affected by the devise; but the devisee must take it, subject to his incumbrance thereon. Can any reason be assigned why it should be necessary that his consent should be given, to render valid her devise? Why should his consent be requisite to enable her to do that which does not affect his interest? Must she have his liberty; and has the law prescribed it out of mere wantonness and tyranny, to do that, the doing of which cannot be injurious to him, and the omission of it in no respect beneficial to him? To require his consent, lays her under a very unnecessary, and consequently, a very unreasonable restraint. Admit the idea of full liberty in her to devise, independent of

his pleasure, and all danger of coercion is at an end; for, to save appearances, and to render her husband easy, she can make a will which accords with his wishes: but if it do not with her own, most assuredly he will be surprised with another, which she may lodge with some confidential friend, a will which is perfectly the will of her choice.

It may be said that this doctrine will render a deed valid by her, without the consent of her husband; and that this is a novel doctrine, never before contended for. This objection, I flatter myself, will be found satisfactorily answered in a former chapter, to which I refer the reader. (a.)

* Is there, then, any solid reason why a wife may not [*141] devise her estate, without the consent of her husband, where no legal right of his is to be affected? Is it not enough that the law has given to her husband the whole of her personal estate in possession, and the entire disposal, if he chooses, of her personal property in action, and her chattels real; without taking from her the power of devising that estate which is still her own, to which he has not any right, and never can have, merely because it is the sovereign pleasure of her husband that she should die intestate, when all others of the community may devise their property? Has she no particular object of her affections to whom she would wish to give her estate? Must she be destitute of power to reward the dutious affections of meritorious relatives, and reluctantly learn that her property must, on her death, be enjoyed by an undutiful heir, who has never merited a single favor at her hands? Why should she not have it in her power to procure from those about her such treatment as she would probably receive from them, when they knew that it was in her power to reward their attention, or defeat their expectations, if treated with disrespect? Having attempted to show that it was reasonable that she should possess this power of devising her property, I will now examine the subject as it stands on legal ground.

The result of this inquiry, I apprehend, will be found to be this: That, under whatever circumstances we find a wife pos-

seased of property, separate from her husband, which does not belong to him, and cannot, at the moment the devise takes effect; such devise by her, without the consent of her husband, is good on the principles of the common law; and whenever she is deprived of that power, it must be by statute. (1) That she can devise personal property, which belongs to the husband, with

(1) The proposition, laid down in the text, that a married woman may devise her separate property, without the consent of her husband, when such property becomes vested in her by virtue of a deed of settlement executed prior to the marriage, may well be sustained upon general principles, for in such a case the wife holds and enjoys the property, with all its incidents, whereof the *jus disponendi* is one; and where she has the complete control over the principal, she must, of necessity, have it over the produce and accretions. *Fettiplace v. George*, 3 Bro. C. C., 8; *Varn*, 535; *Gore v. Knight*, Prec. in Chan., 255. But it is to be borne in mind that equity alone gives force to testamentary dispositions of this character, under the name of an appointment, or declaration, of a trust. 1 Rob. on Wills, 25; 4 Kent's Com., 505.

The act of 1842, of New York, amending sec. 3 of act of 1843, provides that a married woman may convey and devise her real and personal property, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with the like effect as if she were unmarried. In Pennsylvania, the wife may dispose of her property by will, provided the instrument be executed in the presence of two or more witnesses, neither of whom shall be her husband. Act of 1848; *Dunlop's Laws of Penn.*, 1124, 1125. And in New Hampshire, a married woman who is twenty-one years of age may devise real estate, if the will be attested and subscribed by three witnesses thereto in her presence. Comp. Stat. of N. H., 1853, ch. 152. In Massachusetts, a married woman can make a will of her real and separate personal property as if she were sole; but such will cannot operate to deprive her husband of more than half of her personal property, without his consent. General Stat. of Mass., 1860, ch. 108, p. 538, sec. 9. By the Revised Statutes of Maine, 1857, ch. 61, the wife may convey and devise her real and personal property by will, as if she were sole. See, also, Compiled Statutes of Michigan, 1857, ch. 92, p. 263; Laws of Vermont, 1847, No. 37, sec. 2. The act of May 4, 1865, of Pennsylvania: "The power of any married woman to bequeath or devise her property by will shall be restricted, as regards the husband, to the same extent as the husband's power so to dispose of his property is restricted as regards the wife, namely, so that any surviving husband may, against her will, elect to take such share and interest in her real and personal estate as she can, when surviving, elect to take against his will in his estates, or otherwise to take only her real estate as tenant by the curtesy, provided that nothing herein contained shall affect the right or power of the wife, by virtue of any authority or appointment, contained in any deed or will, to grant, bequeath or devise, as heretofore, any property held in trust for her sole and separate use."

his consent, is manifest from a variety of authorities. (a) (1)

[*142] *I wish it to be remarked, that these are the cases in which we find the doctrine laid down, that the devise of the wife, with the consent of the husband, is good. (b) This proposition, abstracted from the subject devised, seems to imply that a devise, without his consent, was not good: but the rule is laid down only in cases where his own interest is concerned; and to no other is it applicable; and in no measure opposes the opinion that, in those cases where his interest is not concerned, she may devise her own property without his consent. It is laid down by Bracton, and, before him, by Glanville, that the will of a wife, generally, is not good without the consent of her husband; for this reason, by them subjoined: because it would be disposing, by will, of his goods. From these ancient authors we find, that it was not uncommon for a wife to devise away her husband's property, with his consent. It is material to notice the reason given, why a wife could not generally devise, without her husband's consent; which was, because it was devising the husband's property. (c) If the property devised had been her own, independent of her husband, there would have been no obstacle to her devising it; and it is observable that Bracton says, generally a wife cannot devise without her husband's consent. This clearly implies that there were cases in which she might devise without his consent. The word *generally* would not have been used, if coverture were a disqualification to devise in all cases. Bracton then goes on to inform us, that it was usual for a wife to devise her dress and ornaments, which, he says, were properly her own property; and mentions this as an exception to the general rule before laid down, that the wife could not generally devise, without

(a) 5 Henry VI, 81; id., 89, 97.

(b) Broke's Devise, 24; Cro. Car., 212, 376.

(c) Reeve's History, 111, 307.

(1) Swinburne, 89. But the husband may revoke the same, not only during her life, but, according to Swinburne, after her death, before the will is proved. But if he confirm the will, after her death, it is forever binding upon him. It is said, however, that an instrument made by a *feme covert* for the purpose of devising real property, made with the consent of the husband, can hardly be called, in strictness, a will. Rob. on Wills, 24; 2 Atk., 49.

her husband's consent. For, he says, in this case, we find a wife owning property independent of her husband; and, at* the same time, we find her right of devising recognized [*143] by the highest authorities. (a)

We shall find, from the ancient writers on the common law of England, that there were other instances where the wife had a real ownership of property, distinct from her husband, so that it was her own, and out of the reach of her husband. This was when, on her marriage (which was frequently the case), the husband endowed the wife, *ad ostium ecclesie*, with personal goods, in lieu of dower in his lands, the property was hers in such a manner that it was not in his power to claim it. (b) This being her own, she might devise it; and this was the occasion of the exception made by Bracton. After Bracton wrote, we find this doctrine expressly laid down by an eminent civilian, Archbishop Stafford. His words are these: Married women have a distinct property from their husbands in some things; and this property they may devise, independent of their husbands.

Nothing can be more certain than that testamentary matters were governed by the laws prevalent in the spiritual courts; and we shall find that, in the reign of Edward III, Archbishop Stafford lays it down, as established by law, that wives might make wills: and he complains that methods had been taken to prevent them; which, he says, was in violation of the usage of the church hitherto approved, and an offence against the divine majesty and the ecclesiastical law. (c) In a later period, Lyndwood, the most eminent civilian of his time, and perhaps of any age, recognizes the same doctrine; and expresses his surprise that the power of a married woman to devise should be combatted by any one, as it seems that it was. He agrees to the rule that the property which belonged to her husband she could not devise without his permission; but, he says, she may have property of her own, which he defines to be, *quæ habet in rebus paraphernalibus** *extra dotem*, which can be no other than [*144] the estate given, as before mentioned, *ad ostium ecclesie*. For he admits the husband's exclusive right to the portion which

(a) 3 Reeve, 9.

(b) 1 Reeve's Hist., 107.

(c) 1 Reeve's Hist., 68.

she brought to her husband, and also to that which she afterwards acquired: and it ought to be remarked, that the only ground on which it was contended that a wife could not devise was that she had no property which was in its nature devisable; for, at that period, real property could not be devised by any person.

It never entered into the head of any person, that any disqualification to devise arose from a state of coverture; but the only reason was, that the wife had no goods, which would have been the same disqualification of a husband, who had no property devisable. That the wife had no goods, was the position that Lyndwood had to combat; for, if she had, there does not seem to have been the least apprehension that there was anything in the nature of coverture that should prevent her from devising.

No inference against this doctrine can be derived from those authorities which say a wife can devise, with consent of her husband: for these were cases of devising his property; and certainly, in those cases, his consent was necessary. A rule, therefore, drawn from those cases, can never apply to cases not under similar circumstances. This was the case where, in the year books, this doctrine is expressly laid down, that a married woman may bequeath, by will, with the consent of the husband. The same doctrine has been recognized, in a later period, in a host of authorities; but, in all of them, the devise was the husband's property.

Perhaps it may be thought strange that a question like this should be embarrassed by a single doubt, at any period of our law; but we must remember the instances of a wife's holding property of her own, distinct from her * husband, were [*145] very few, until within the last century, except the property was real: and this kind of property could not be devised by any person, until the permission was given by the statutes of Henry VIII, which statutes forbade married women from devising their real property. The question could, therefore, but seldom occur, in former times; but in latter years, since it is common for wives to enjoy separate estates, by means of settlements and estates given to them to their separate use, no point

has become more luminous in the English law. See *Vesey*, 190, where Lord HARDWICKE recognizes the doctrine for which I am now contending, in the strongest terms, that a married woman may dispose of such estate, if personal, by any act in her lifetime, or by will. It was urged at the bar, and admitted by the court, that, when a married woman has separate property, that it is incident to such property that she may make a will of it. The words of Lord THURLOW on this subject are, that the proper rule, in all cases, respecting the acts of married women, (a) and respecting their separate property, is, that they are competent to do any act respecting it that unmarried women can do. Says he, it is impossible to say that a married woman is incompetent to act with her separate property, as a *femme sole*. Authorities to this point are numerous. It is, then, no longer a controversy that the English law does not consider coverture as having any qualities which incapacitates a wife from making a will; and when she is found possessed of estate, she may dispose of it as freely as any person, and with as little restraint as a *femme sole*. (b) (1) Married women are not, then, legally incapacitated to devise, otherwise than by statute of Henry VIII. Baron and femme, by articles of agreement, separated; and the husband granted to her a separate maintenance; out of which, by her frugality, she had *saved a sum of money, and made a will, and devised it; and the will was holden valid. [*146] *Lady Rodger's case*, Ch. Ca., 118. The same reason exists why this should be good, as in the other cases: the husband could have no claim upon the money; for it had passed from him to

(a) 1 Ves., 338; 1 Ver., 214; 3 Ves., 35; 1 Bro. in Com., 10; 1 P. W., 126.

(b) 3 Ves., 190; 3 id., 518; 3 Atk., 709; 1 Ver., 253.

(1) See, also, in addition to the authorities cited in the text, *Rich v. Cockell*, 9 Ves., 369; *Gage v. Lister*, 2 Bro. P. C.; *Pridgeon v. Pridgeon*, 1 Ch. Cas., 118; *Bletsoe v. Sawyer*, 1 Vern., 245; *Herbert v. Herbert*, Pr. in Ch., 44; *Peacock v. Monk*, 2 Ves., 190; *Rippon v. Dowding*, Amb., 565; *Southey v. Stonehouse*, 2 Ves., 612. That chancery will consider a married woman in the light of a *femme sole*, with regard to her separate property, either personal or real, is also manifest from a variety of authorities, among which may be cited, *Glyn v. Baxter*, 1 Younge & Jervis, 329; *Headen v. Rasher*, 1 McClelland & Younge, 90; *Sturgis v. Corp.*, 13 Ves., 190; *Wagstaff v. Smith*, 9 id., 520; *Pybus v. Smith*, 1 id., 189.

her, by his own grant, and was her property, over which he had no control.

Perhaps it may be said, that no argument can be drawn from the decisions in chancery respecting their power to devise their separate property; for, that courts of chancery feel themselves at liberty to depart from the rules of law. Whatever powers may have been assumed by chancery, I trust, it will not be found that they have ever indulged themselves to such an extent as to set aside those laws that create, in any person, a disability to contract or devise. This matter may be set in a very clear point of light, by advertng to the case just mentioned. In that case there was a devise by a married woman, of real as well as personal estate, both of them her separate property. Her devise of personal estate was holden to be good; but her real, not good; because the statute of Henry VIII disables a married woman from devising her real property. Had it not been for that statute, it would have passed by the will, as well as the personal property: for nothing can be more certain than this: that, if coverture, independent of the statute, created a disability, then the personal property could not have passed by the devise. With respect to the real property, the statute had created a disability: therefore it was, that she could not devise. Surely a disability created by the common law is as stubborn and as difficult to surmount as one created by statute; but we find that she was possessed of power to devise her personal property. Of course, there was no disability at common law resulting from a state of [*147] coverture; and if a court of chancery so respected* the statute as not to decree counter to it, their respect would have been as great for the regulations of the common law. They never conceived that they had more power to dispense with the regulation of the one, than with those of the other.

If an agreement, under hand and seal, in nature of a settlement, be made, before marriage, betwixt the intended husband and wife, respecting the real property of the wife, that the wife shall have power of disposing of her lands as she pleases, and marries, she may dispose of it, by an instrument in nature of a will, notwithstanding her disqualification by 34 Henry VIII; for

this is only the execution of a power which she is competent to do. (1) It is not in the power of the intended husband to vest her with authority to devise her real property; for she is utterly disqualified by statute. Her lands, therefore, do not pass to the devisee in her will; for it only operates upon the estate that the husband has in the lands, by virtue of his marriage with her. He could give her power to dispose of his interest in the lands; but he could not repeal the statute, and give her power to devise her own lands; for she cannot devise her sole and separate real property by will. Thus no marital right is affected thereby; for this is absolutely forbidden by the statute of Henry VIII, when, at the same time, her will of her separate personal property is valid: for no statute prohibits her, and neither does the common law. 2 Ves., 75, 610.

Suppose the devise had been before marriage, would the marriage be a revocation of the will? (2) It seems that it would,

(1) So she may make a will in favor of her husband, in the execution of a power, reserved to her while sole, over her separate estate. *Bradish v. Gibbs*, 3 John. Ch. Rep., 523. As to the general principles of the text, see *Anderson v. Dawson*, 15 Ves., 532; *Barton v. Briscoe*, 1 Jac., 603; *Rich v. Cockell*, 9 Ves., 369; *Rippon v. Cowding*, Amb., 565; 4 Kent's Com., 506.

A power in a marriage settlement, authorizing a married woman "to enjoy, control, receive and dispose of property, during and notwithstanding such marriage, as a *feme sole*," does not entitle her to dispose of her property by will. *Wadhams v. Am. Home Miss. Soc.*, 12 N. Y. (2 Kern.), 415. Held, in *Talbot v. Calvert*, 24 Penn., 327, that an ante-nuptial settlement, giving power to the wife to dispose of property by will, has no effect to give her such power. See, also, 12 N. Y., 415, above.

Held, in New Hampshire, that, as the law now stands, a married woman cannot make a devise of real estate to her husband. *Wakefield v. Phelps*, 37 N. H., 295. But, in Pennsylvania, it was held that, where a statute made the husband heir to his wife's real estate, with his consent she could will this real estate to him, as well as personal property. *Wagner v. Ellis*, 7 Penn., 411. By the statute of Indiana, a married woman may make will of real and personal property. Laws of Ind., 1859, ch. 141, p. 248.

(2) Where a woman, being about to marry, entered into an agreement with her future husband, without seal, by which her property was settled on the survivor for life, with power to the wife to dispose by will to be made after marriage; she then immediately makes a will by which she bequeaths her property to her intended husband, absolutely, and afterwards marries. The articles, resting in agreement, give the husband an equitable estate for life, but the will is revoked by the subsequent marriage. *Hodson v. Lloyd*, 2 Bro. C. C., 534; R. B., New York, 5th ed., vol. 3, p. 145, sec. 39.

according to the case of *Dover v. Staple*, 2 T. Rep., 684. What, then, is the reason that this devise should be revoked? May not that which, if it had been done after marriage would have been valid, remain valid after marriage, though it was done before? The difference is this: If the devise was made before [*148] marriage, it * would operate upon the land devised, to pass it to the devisee, upon the death of the testator; but if it were made after marriage, it was the mere execution of a power to pass the husband's estate therein; so that the same reason exists why marriage should be a revocation of her will as exists in other cases, viz., that she cannot, after marriage, control her property, whatever event might have taken place that would have rendered it improper that the will should take effect.

In 2 Ves., 75, it is laid down, as the known law of the land, that the assent of a husband is not necessary to give validity to the will of his wife, when it is a will of her separate property. Those cases which admit of the ability of the wife to devise, with the consent of the husband, which are cases of her devising his property, in no measure oppugn the idea of her ability to devise her own property, without his consent; and even these cases demonstrate that there is no incapacity to devise arising from coverture; for, if there had been, his consent could avail nothing. And, in the case first mentioned, there was the husband's consent to devise her real property; but it was declared as sound law, that the husband could not give liberty to his wife to devise real property, for the statute had expressly forbid it. The statute had created a disability, and it was not in his power to remove it: and, if the common law had created a disability, it would have been as much out of his power to remove it, as if it had been created by statute.

It will be remembered that the personal property, at common law, was the only property which was devisable. It follows, then, there was no property which, by the common law, was devisable, but what could be devised, as well by a married woman as by any other person.

With respect to her choses in action, we find it laid down in the books, that, in case her husband survived * her, if he [*149] had not reduced them to possession, during the coverture,

they did not belong to him, but went to her representatives. In this estate, then, on her death, he had no interest. Upon the principles contended for in this chapter, we should expect to find, that a married woman might devise her choses in action; and the result of the investigation is, that she can: for we find it adjudged, that, of things in action, she may make a will; and that this is properly a will in law, and ought to be proved in the spiritual court. (a) (1) This adjudication could never have taken place, if any idea had been entertained that coverture disabled the wife from devising. How this right of the wife, to dispose of her choses, would be considered, since the enacting of the statute of Car. II, by which the husband is entitled to the choses of the wife, by administratorship, without liability to account for the surplus, after paying her debts, is, perhaps, uncertain. This is, however, immaterial to our inquiry; for the law, to which I have adverted, was established when the husband was not so entitled. I should believe that the statute had not infringed the right of the wife to devise her choses. The law has made the husband residuary legatee of the surplus of her estate, after paying her debts, which he is not liable to pay after her death, in character of her husband; but is liable to pay as administrator. And although it is clear that his interest may be affected by the devise, yet it is not an interest belonging to him as husband: no marital right is affected: it is nothing more than a contingent right of an heir or representative, which is always liable to be defeated by a testator. Although this point should be determined otherwise, where there is such a statute as that of Car. II; yet, where there is no such statute, the law remains as it ever has been, that a wife may dispose of her choses by will. (2)

(a) 1 Mod., 211, 212.

(1) *Ante*, chap. 1.

(2) The necessary inference, from the fact that her choses in action descend to her representatives, would seem to be, that she could dispose of them by will; and this is the correct doctrine in such of the United States as recognise the right of the wife to devise at all. We shall see hereafter that in many of the states the wife is considered wholly incapable of conveying her property by will, while in others this power is conferred upon her by express statute provisions. (See page 233; *ante*, note.)

* If the principles of this chapter be correct, a wife [*150] may make a will of things which she has in *auter droit*; for these cannot belong to the husband. It is the law of the books that she can. These are the words of the court, in the cases cited in the margin, of things which are holden in *auter droit*. A wife may make a will without her husband's assent. (a) (1) In every situation, in which a wife is found possessing property, which cannot belong to the husband, on her decease, she may devise it, unless she is prohibited by force of statute. Very few instances can be found of a wife's owning personal property, until of late years, since the practice of her having separate property has taken place; and in all these, which can be found, it has always been held that a wife may devise such property. And since the practice of her having separate personal property has been recognized as legal, it is indisputable, that she may devise such property, even as to her choses, which are at her husband's disposal; yet, if he do not, during marriage, dispose of them, he can have no interest in them after her death; therefore her will will operate upon them. (2)

Real property, indeed, may belong to the wife, and, on her death, he has no interest in the fee. Why then do we not find in the books of the law, that she can dispose of her real property by will? The answer is easy. During the Norman system of feuds, until the reign of Henry VIII, no person could devise real property, neither men nor women, husbands nor wives; and the statutes of that reign, which enabled persons holding lands in fee simple, to devise, expressly disabled married women.

(a) 2 And., 98; Moor, 840; 1 Roll., 808, 912, 214; 2 East, 532.

(1) 2 Kent's Com., 170, 171. So where an estate is limited to uses, and power is given to a *feme sole* to declare such uses, the limitations of uses may take effect; and if she afterwards marry, she may limit the uses, by way of execution of a power, which is rather an appointment than a will. And she may, under a power of appointment in a marriage settlement, over a personal chattel, appoint in favor of her husband, and in the absence of coercion or fraud, equity will enforce such appointment. *Whittall v. Clark*, 2 Edwards' V. C. Rep., 149; *Chealyn v. Smith*, 8 Ves., 193.

(2) 2 Kent's Com., 170; *Peacock v. Monk*, 2 Ves., 190; *Rich v. Cockell*, 9 Ves. 569; *West v. West*, 3 Randolph's Rep., 373.

There is, then, no period of the English law, from which it is possible to derive any light on this subject; unless we can find in what point of light the subject was viewed by our Saxon ancestors, before the restraints of the Norman system of feuds took place. It is very difficult to * learn much on [*151] this subject, from the scanty remains of the Saxon laws, which have escaped the waste of time. One thing seems to be agreed by law writers, that the practice of devising real property was understood and practised by the Saxons in England; and whatever is to be found respecting the power of a married woman to devise her real property, during this period, is altogether in favor of the opinion contended for.

Certain it is that no vestige of devising will be found among the Saxons, in the rude state in which they were, when they emigrated from Germany into England; neither did any such usage exist among the ancient Britons, before England became a parcel of the Roman empire. The notion of devising was then most probably derived to the Saxons from the Romans, amongst whom it was fully recognized.

As the Roman law had been thoroughly established in the south of Britain for several centuries before the Saxon invasion, it was most probably the Roman or civil law, respecting this matter, which was adopted by the Saxons; and, by the civil law, it is certain that a married woman could devise her property, both real and personal. There are a few scattered judgments in the books, from which an argument can be drawn corroborative of this idea.

Amidst the general wreck of the Saxon laws and usages, upon the prevalence of the Norman system, a few still remained unhurt, as customs of particular places: amongst these was that of devising real property; and we find a married woman availing herself of that custom to devise her real property; and the custom was held good. It must be admitted, in that case, there was the consent of the husband. There is, however, no intimation that his consent was necessary to give validity to the devise; (a) but that happened to be the case before the * court. We [*152] also find, that it was a custom in particular places, that a

(a) 2 Roll. Abr., 515, &c.

married woman could surrender her copyhold estate to the use of her will; (a) and there is not the least intimation that the consent of her husband was necessary to give effect to the surrender.

There is the case of *Compton v. Collinson*, reported in the 1st of Henry Blk., 384, determined upon analogous principles, where a wife lived separate from her husband, under articles of agreement, in which the husband had renounced all claim of any right which he had in her real property. The wife, thus separated, surrendered her estate to the use of her will, without joining her husband in the surrender, and died; and the question was, whether the devisee could hold the property against the heir at law? It may seem strange to the reader how such a question could arise in the English law, where married women are, by the statute, disabled from devising: but it must be understood that copyholds pass by surrender; and the will is considered as a declaration of the use, in the conveyance by surrender: so that, at common law, a copyhold right, in this way, may be devised: the whole transaction being nothing more than an alienation of the estate by deed, which mode was well established before the statute of wills. In this case it was determined that the devise or surrender passed the estate to the devisee, the coverture notwithstanding; and the reason given was, that the husband, by his own covenant, had no interest in the land. No marital right of his could be affected by her sole conveyance; and, of course, her act alone was a valid act. This proceeded upon the same ground as all the other cases where a wife owns property, in such manner that her disposal of it cannot affect her husband's right, she is competent to convey it, devise it, or do any other act respecting it, that any other person could do.

[*153] In ancient times, it was * a common thing for a woman to devise, whilst married, her *rationabilis pars* of her husband's personal property or estate; it being a certain proportion, perhaps one-third part of her husband's estate which would belong to her on her husband's death, provided she outlived her husband, and then died. Such devise, so made, was held good; and, since the statute of wills, we find a married woman, during

(a) 2 Brownl. & Lev., 12.

coverture, devising her lands; her husband died, and then she died. This was held to be void, for the consummation of the will depended upon the making; and at the time that it was made, she was disqualified by the statute of wills. Certain it is, then, upon the principles that a wife is disqualified from devising at common law, the court ought to have determined that the devise of her *rationabilis pars*, in the case before mentioned, was void; yet this was held valid. If the disqualification, at the time of making the will, renders the devise of lands void, a disqualification, at the time of making the will, must have rendered the devise of the *rationabilis pars* void; but it was held good. This is decisive of the question, that the court did not suppose that, at common law, coverture was a disqualification to devise.

That the will of a *femme covert*, as it respects things in *auter droit*, is as before stated, and that her husband may be made executor. See Brook's Test, 9; 4 Hen. VI.

A *femme covert* may devise her lands to her husband, where it is the custom of the manor. Mod., 123.

There is another case in Brook's Devise, that a *femme covert* might devise her lands, (a) where, by custom, lands were devisable; but could not devise them to her husband, because the devise being in his favor, it might be presumed to have been done by coercion: but there was no objection on the ground of incapacity, resulting from a state of coverture. 3 Edw. III; 6 Edw. III.

(a) Br., 12.

[*154]

* CHAPTER XII.

THE POWER OF THE WIFE TO DEVISE.

[CONTINUED.]

IN those states, where there is no statute disqualifying her, can a married woman devise her real property? There is no question but that she is disabled, in England, by the statute of 34 Hen. VIII; but the influence of this statute does not extend to this country; although it is true that many ancient English statutes, which were in force in England, before the emigration of our ancestors from that country, have been considered of equal force, in this country, with the common law of England. And, I admit, that upon every question, where there has been no adjudication of court opposed to the English common law, nor any opposing statute, that the law, as published in the English books of reports, is our safest guide; and ought to be, as it generally has been, adopted by our courts, unless it should be repugnant to reason, or incompatible with our circumstances. And, I will not contend, but that a statute, enacted at a period when the statute of Henry VIII, respecting wills, was enacted, and of a nature so generally applicable to the circumstances of mankind, in whatever country they may be, as that statute, ought to be of as high authority as the common law of England. Yet this is to be understood, invariably, with this exception; that where we have a statute of our own on the same subject, the regulations of our own statute are the only laws upon the subject. When our statute is expressed in the same language with their statute, and * at the time of enacting our statute, [155*] a construction has been given by their courts to their statute; the construction so given, ought to, and will be considered of very high authority: for the using of the same language, which had received a construction by the courts of the country, whence we have derived our law, amounts to a declaration by the legislature, that the construction so given, was perfectly satisfactory to them. But when the legislature of this country enact a sta

tute, varying in language from the English statute upon the same subject, the provisions of their statute are of no authority with us; for our own legislature have chosen to provide such laws upon the subject, as they have judged most expedient for our circumstances. The legislature, in several states, enacted laws upon the subject of wills, very early after the settlement of this country; the provisions of which remain in force at this time; which statutes vary, in many respects, from the English statute, and are our only guide. Nothing, then, can be claimed from the statute of Henry VIII, against the power of a wife to devise her real property here. Whenever we look into our own statute, in Connecticut, and find no intimation that a wife shall not have a power to devise, (as is the case with us, and some of the other states,) if the legislature intended any thing of this kind, it is difficult to conceive why they did not express such intention, at the time of enacting those statutes. (1) The English statutes of 32 and 34 Henry VIII, were well known; and it is remarkable, that our statute, in many of its expressions, is a literal copy of the 32d of Henry VIII, with the addition of all the exceptions of the 34th, only that of *femmes covert*, which is omitted. Why there happened the omission of that, which it was so easy to have inserted, unless the legislature intended that *femmes covert* should have full liberty to devise, is not easily accounted for. That a decisive * conclusion in favor [*156] of the power of the wife to devise, is to be drawn

(1) By a late statute of Connecticut, (1838) married women are enabled to dispose of their real and personal property, by will, in the same manner as persons under no disabilities at common law. Under this statute the wife has the same power of devising, that she possessed in England, prior to the enactment of the statute of wills, with this one exception, that at common law a female of the age of twelve, might make a will, while by the Connecticut statute, the infant of either sex is required to be seventeen, to be competent thus to dispose of personal estate.

In New York, the wife may dispose of personal property by will at sixteen years of age. R. S., 5th ed., vol. 3, page 141, sec. 20, taken in connection with the act of 1849, sec. 77, page 240, same volume. And at twenty-one years of age, she may dispose of real property. *Ib.*

For reference to statutes of different states on this subject, see note to page 141, (marg.)

from this quarter, I shall not pretend; for, if she were disabled by common law, she would remain disabled. But the inference is a fair one, that the legislature which enacted the law, did not intend to lay her under any constraint by statute. (1)

I trust that I have already shown, that, at common law, she possessed the same power of devising whatever could be devised, as the rest of the community; and that the restraints of the statute of Henry VIII, have not the smallest operation in this country; and that we find no restraint in the statute of our own, to which I have adverted. But we have an additional clause inserted in our statute, at the revision of the laws in 1784. Upon the re-enacting of that statute, this additional clause was inserted, viz.: "*and all others legally incapable*," immediately after the exceptions mentioned in the statute. Has this addition made any alteration in the law? Most certainly not: It only informs us that persons legally incapable of devising, could not devise; which would have been the case whether enacted or not. All that can be inferred from this statute, is, that it was a cautious declaration, that the general license given to devise, should not be extended to those who were, by law, incapable to devise. The inference is again to be made, that, if the legislature had intended to restrain wives from devising, they would have added it to the other exceptions mentioned in the statute.

And on the other hand, I will admit, that they did not intend to give them license, if there were any legal incapacity attending them, resulting from a state of coverture. They are, then, prohibited from devising by no statute, unless that prohibition is to

(1) The late English decisions upon this subject, are to be examined with reference to a statute of 1 Victoria, ch. 26, which has considerably altered the law of devises. In the year 1833, the English property commissioners recommended the enactment of a statute disabling an infant from making a will, in any case; and to carry out this suggestion, the statute of Victoria was passed, under which no will of a person under age, or a *married woman*, is valid, except such a will as might have been made by a married woman prior to the passing of the act. The effect is that a married woman in England, may still make a will of personal estate, with her husband's consent, and a will of real or personal estate settled to her separate use; and she may also make an appointment by will in pursuance of a power to be executed, notwithstanding the coverture.

be found in the sweeping clause, *and all others legally incapable*, which supposes some pre-existing law, which creates the incapacity; and that can be no other than the common law. It cannot * be understood in this sense, viz., that all those who were incapable of devising lands, by common law, shall [*157] still be incapable; for this would amount to a prohibition of all persons to devise, and would render the statute of wills nugatory: For, by the common law, no person could devise real property; all were legally incapable. To understand the statute in this way, would be to suppose that the statute declares, that all may devise, except such as are legally incapable; and that all persons *are* legally incapable. Of consequence, a license to devise real property, is given to no person. The absurdity resulting from this construction of these words, must prevent its being admitted as just. The genuine construction of the prohibition, I conceive to be this: that where there is no legal incapacity of devising, generally, such subjects as are at common law devisable, liberty is granted to devise lands; or, in other words, lands, by this statute, are put upon the same footing with other property, relative to their capacity of being devised: So that, whenever a person is found capable, by law, of devising other property, that same person may devise lands; and those who are legally incapable of devising other property, cannot devise lands. Can an idiot, at common law, devise his personal property? If he can, then, if there had been no prohibition in the statute, he may also devise his real property. If he cannot, this statute gives him no license to devise it. Could a *femme covert*, at common law, devise such property, as was, by the common law, devisable? I flatter myself that it has been demonstrated that she could. I apprehend, then, on every construction, the conclusion fairly follows; that she may, in Connecticut, and in many other states, where there are no prohibitory statutes, devise her real property. See a case in Ambler, 627, where the husband had covenanted, that she should have power to devise her real property, and she did so * devise; but it was holden that such devise was void: for, by 34 Henry VIII she [*158] was rendered incapable of devising real property; and that the

husband could not remove the disability created by statute. Many authorities were produced to show, that the husband's agreement had rendered the will of wives valid. The court observed, that all the cases were of wills of personal property; and said, that there could be no doubt but that a husband could give his wife power to devise personal property, but not real, because the statute forbids it. This must be conclusive, that the common law never created any disability in a wife to devise, any more than in any other person; for, if it did, the will of the husband could no more remove a disability created by common law, than one created by statute. (1)

The case of *Forse and Hembling*, 4 Coke, 60, has, in argument, been often relied on to prove that there is an incapacity, resulting from a state of coverture, to devise, independent of the statute. I have never been able to apprehend how that case contributes, in the smallest degree, to prove that doctrine. The case is simply this: Susan devises her lands to Benjamin, and,

(1) Married women are considered incapable of making a will of lands, where no statute of the state gives them such power. *Osgood v. Breed*, 12 Mass., 225; *Martton v. Morton*, 5 N. H., 205; *West v. West*, 10 Serg. and Rawle, 445. The statute of 1849, of New York, gives married women power to make devise of real property, as if sole. For the section of the statute conferring this power, and, also, for references to statutes of other states, authorizing married women to make wills of their property, see note to page 233.

The general principle is said to be, that a married woman cannot devise, and the cases in which she may dispose of property by will, are exceptions. 2 Kent's Com., 170; 1 Rob. on Wills, 23. As the statutes on this subject are so numerous and decisive of the question in most of the states, it is not now necessary, for practical purposes, to inquire whether coverture is, *per se*, a disqualification. That a married woman may, in those states where there is no statute prohibition, dispose of her separate property, settled upon her by the covenant of her husband, either before or after the marriage, and also of all such chattels as she holds, *en aster droit*, without the license of her husband, by will, and that such disposition will be sustained by a court of equity, are propositions supported by the authority both of common sense and of the decisions. But it is said that an instrument made to devise such property cannot be called, in strictness, a will, but something in the nature of an appointment which the husband by his covenant is bound to allow, and it is so considered by the elementary writers. 1 Roberts on Wills, 24; 2 Kent's Com., 171. The operation of the instrument when carried into effect is the same, whether it be called an appointment or a will, and the learned disquisitions of the authors, to prove that it is the one or the other, cannot be regarded as of much importance.

afterwards, marries him, and dies; and the husband could not take the lands; and why not? Because the statute prohibits a femme covert from making a will of real property. If it be objected that the statute could not operate upon it, because Susan was *sui juris*, at the time of making her will, the answer is: It is a well known maxim of the common law, that the testator must be not only capable of devising at the time of making the will, but also at the time of consummating it; at which time she was incapable of making a will, being then a married woman. This doctrine was established in a case in Plowden. To this rule there is no exception, only in the case of a will being * made, and the testator becoming afterwards *non compos mentis*. [*159]

At this day I very much question whether a court would establish such a will, where a considerable length of time had elapsed since the testator became *non compos mentis*; especially if there had been any very material change in the circumstances of his property and family, so that the legatees would be provided for, in a manner very different from what was the manifest intention of the testator; as where A made his will, and gave to his daughters, B and C, one thousand dollars each, to be paid out of his personal property, and to D and E, his sons, he gave his real property, to be divided betwixt them, of the value of four thousand dollars. Soon after, the testator became deranged, and utterly incapable of making a will, and lived many years, during which time his personal property was so spent that, after the debts were paid, there was nothing left for the daughters, and the sons received the whole of the real estate.

The principles which govern in other cases, if applied to this, would warrant a decision that there was an implied revocation of the will; for nothing can be more apparent than that the testator meant to provide for his daughters out of his estate. To guard against such events as these, the law considers the marriage of a woman a revocation of her will which she made when a *femme sole*; for she is, by law, rendered incapable of making a will after marriage.

A *femme covert*, by the custom of London, may convey her land by deed enrolled; but must be examined by a magistrate,

whether she does it freely. Hob., 225. If there were any disability to convey, resulting from a state of coverture, this custom could not exist; for it would be deficient in an essential qualification of a custom, viz., that it must be reasonable: for, surely, [*160] nothing * can be more unreasonable than to admit that to be law, in any place, which admits an act to be valid which is done by a person utterly incapacitated to do it. A custom that the act of an idiot, or lunatic, should be binding, would be an unreasonable custom; and yet not more so than to admit the act of a *femme covert* to be valid if coverture incapacitates her to do it. .

[*161]

*CHAPTER XIII.

OF MARRIAGE BEING A REVOCATION OF THE WILL OF A WIFE MADE BEFORE MARRIAGE. OF HER SEPARATE PROPERTY. OF SETTLEMENTS ON A WIFE BY MINOR HUSBANDS. OF MARRIAGE SETTLEMENTS BY HUSBAND ON WIFE, BEFORE AND AFTER MARRIAGE.

It is often said in the books, that, if a wife make a will and marry, that the marriage is a revocation of the will. This proposition seems to be very questionable. It certainly prevents the will from having the operation that was intended, in most cases; and, in those cases, marriage may be considered as a revocation. But there are cases where, I apprehend, it may have the operation intended. If a woman marry, having disposed of her personal property in possession by will, the marriage gives it to the husband; and, on the death of the wife, there is no such property for the will to operate upon. So, too, if a wife before marriage, should have made a will of her lands, it is said that this is a revocation of her will; and it must be admitted that this seems to be the language of the court in 4 Coke. It is true that such a will, in England, cannot have any effect; but I do not

apprehend that the true reason is, that marriage, in all cases, is a revocation of the will of the wife. It is necessary that the person who makes the will should have the power, both at the inception of the will and at the consummation of it; and, by the statute of Henry VIII, a married woman has no power to make a will of lands. It is reasonable that a will, made before marriage, should have * no effect; for it would often happen [*162] that, after a lapse of years, whilst she was a married woman, there would be a total change with respect to her family connections; and those persons who, at the time of making the will, were the objects of her bounty, have ceased to be such. The truth is, no instrument ought to be considered as a will after the testator's freedom of disposing is taken away, so that no alteration respecting the property disposed of can be made. Marriage is a revocation of a will only in such cases where the marriage gives to another the property disposed of, and in those cases when, after marriage, she cannot alter the disposition made before. If this be the true point of light in which this subject ought to be considered, then a will, by a *femme sole*, of her choses, who marries and dies before her husband has reduced them to possession, will be good; for these are not given to the husband by the marriage until he does reduce them to possession; and there is no disability arising from coverture which will prevent her from making a will of those during the coverture. (1)

(1) In *Ambler*, 627, and *Forse v. Hambling*, 4 Coke's R., 61, a, the proposition is expressly laid down, that a woman's marriage alone is a revocation, or rather a countermand of her will, if she dies in her husband's lifetime. In the case in Coke, it was objected that, although, upon the marriage, the power of the wife to revoke her will had ceased, still there was no reason why the marriage should be a countermand; for if a man *sane omnino* made his will, and afterward became *sane compos mentis*, he could not countermand his will, but yet his disability was no revocation. But the court were unanimous that the will was revoked by the marriage, because the making of the will was but the inception, as it does not take effect till after the death of the deviser; so it would be against the nature of a will that he who makes it, being in sound mind, cannot countermand it.

It will be observed that the statement of the foregoing cases contains the proposition that the wife should die in the husband's lifetime. Afterwards, in *Cotton v. Sayer*, 2 P. Wms. Rep., 524, and in *Mrs. Lewis' case*, 4 Burns' Eccl. Law, C., 47, it was held that a will made by a woman was so totally revoked by marriage that

A wife may have separate property, distinct from her husband in which the husband has not any interest, both in personal and real estate. This is frequently effectuated by marriage settlements, in which certain property is given to her sole and separate use. It may be so given, by any person, by deed or will, after she is married; and in such estate, if it be real property, the husband is not entitled to the usufruct during coverture, nor to the courtesy after her death. If it be personal, he has not any interest in it, or control over it. Estates so given, were formerly in all instances, conveyed to trustees for the use of the wife; and the wife had the whole control and management of the estate. (a) The rule is, that she may do what she pleases with such estate, by any instrument which she makes; and, unless in the grant, [*163] it was made * necessary for her to join with the trustees, she may do it without them. (1)

(a) 3 Atk., 605; Banbury, 187.

it could not revive on the subsequent death of the husband. In *Doe v. Staples*, 2 Term Rep., 684, the court do not seem to have been unanimous on this point, though the opinion of Lord KENYON was in favor of the proposition. The opinion of Chancellor KENT also coincides with that of Lord KENYON, 4 Kent's Com., 520, as does also that of Mr. Roper in his learned and accurate treatise on the law of Husband and Wife, vol. 2, p. 69. The question in New York is put at rest by an express provision of the statute declaring that the will is revoked by the subsequent marriage. Rev. Stat., New York, vol. 3 (5th ed.), p. 145, sec. 39.

And the act of 1833, of Pennsylvania, providing that the will of a single woman should be revoked by her subsequent marriage, was held not to be repealed by the act of 1848, securing the rights of married women. Will of Anne Josephine Franzen, 26 Penn., 202.

In New York, "if, after the making of any will disposing of the whole estate of the testator, such testator shall marry, and have issue of such marriage, born in his lifetime or after his death, and the wife or the issue of such marriage shall be living at the death of the testator, such will shall be deemed revoked, unless provision shall have been made for such issue by some settlement, or unless such issue shall be provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of such revocation shall be received." R. S., New York (5th ed.), vol. 3, p. 145, sec. 38. And in *Hauns v. Van Du Burgh*, 1 Denio, 27, when marriage and the birth of a child were treated as a revocation of the will, it was held that the presumption of a revocation might be repelled by slight circumstances. See, also, *Adams v. Winne*, 7 Paige, 97; *Langdon v. Astor's executors*, 16 N. Y. (2 Smith), 9.

(1) The validity of marriage settlements, to place property under the separate

Of late years, it is no uncommon thing for an estate to be given directly to the wife, to her separate use, without the intervention of trustees. (a) Doubts have been entertained respecting the correctness of this practice; but those doubts are now at an end; (b) and it is settled that this can be done; and any words in the instrument, under which she claims a separate property,

(a) 1 Ves., 518. (b) 1 P. Wms., 127; 2 id., 816.

control of the wife, has long been recognized both in England and the United States. Among the very numerous cases thus sanctioning their validity, may be cited the following: *Brown v. Jones*, 1 Atk., 190; *Middlecome v. Marlow*, 2 Atk., 519; *Todd v. Stokes*, 1 Salk., 116; *Lord Rodney v. Chambers*, 2 East, 383; *Nourse v. Craig*, 5 Bos. & Pull., 148; *Ward v. Shallett*, 2 Vesey, 16; *Lady Arundel v. Phipps*, 10 Vesey, 139; *Cook v. Wiggins*, 10 Vesey, 191; *St. John v. St. John*, 11 Vesey, 530; *Pulvertoft v. Pulvertoft*, 18 Vesey, 92; *Hindley v. Westmeath*, 6 Barn. & Cress., 200; *Reade v. Livingston*, 3 John. Ch. Rep., 481; *Meth. Ep. Church v. Jaques*, 1 John. Ch. Rep. 65; *Rogers v. Rogers*, 4 Paige's Ch. Rep., 516; *Shelthar v. Gregory*, 2 Wend., 422; *Magniac v. Thompson*, 1 Bald. C. C. U. S. Rep., 344; *Roane v. Hearn*, 1 Wash., 37; *Picquet v. Swan*, 4 Mason, 443; *Sexton v. Wheaton*, 8 Wheat., 229; *Bullard v. Briggs*, 7 Pick., 533; *Rundle v. Murgatroyd*, 4 Dallas, 304; *Scott v. Lorraine*, 6 Munf., 117; *Bray v. Dudgeon*, *ibid.*, 132; *Tyson v. Tyson*, 2 Hawks, 472; *Croswaite v. Hutkinson*, 3 Bibb, 37; *Nichols v. Palmer*, 5 Day, 47; *Tunno v. Trezevant*, 3 Desaus., 269; *Abrams v. Whitman*, 4 *ibid.*, 255; *Elms v. Hughes*, 3 *ibid.*, 158; *Souverybye v. Arden*, 1 John. Ch. Rep., 240; *Cruger v. Douglas*, Vice Chan. Ct. N. Y., 17 Dec., 1845; *Woodcock v. Moncton*, 1 Coll., 273.

In the foregoing cases the doctrine of marriage settlements is discussed in all its ramifications. Although the opinions of the courts may be found to differ in some trifling minutiae, yet the principles generally inculcated are the same, and in all their effect to place property at the entire disposition and control of the wife, explicitly recognized. As to the other method of acquiring separate property by the wife, the following cases may be cited: *Tyrrell v. Hope*, 2 Atk., 558; *Darley v. Darley*, 3 Atk., 399; *Hartley v. Harle*, 5 Vesey, 540; *Pritchard v. Ames*, 1 Turn. & Ry., 222; *Beable v. Dodd*, 1 Term, 193; *Horseman v. Abbey*, 1 Jac. & Walk., 381; *Jameson v. Brady*, 6 Serg. & Rawle, 467; *Torbert v. Twining*, 1 Yeates, 432; *Perry v. Bolleau*, 10 Serg. & Rawle, 208; *Evans v. Knox*, 4 Rawle, 497; *Smith v. Smith*, 6 Munf., 581.

Property owned by the wife on marriage, and what accrues to her after marriage, by inheritance, gift, grant, devise or bequest, from any person other than her husband, are made her sole and separate property in New York, Sec. 1, Act of 1849, of New York. And ch. 90, Laws of 1860, of New York, provides, that the property which any married woman acquires by her trade, business, labor or services, carried on or performed on her sole or separate account, shall, notwithstanding her marriage be, and remain her sole and separate property. For provisions of other states in regard to this subject, see note to page 49, *ante*.

are sufficient, provided they are clearly indicative of such intention. In 3 Brown in Can. it was determined, that a legacy to a wife; in which were the following words, viz., "her receipt to be a sufficient discharge to the executors;" was her separate property; and that those words were equivalent to the words "her sole and separate use;" and there is a case there cited, by which it appears, that it had been held, that the words, "the wife's receipt shall be a sufficient discharge," notwithstanding a legacy given to the wife, *to be paid to her*, without any other words, it is not her separate property, and no marital right is affected thereby. The words, "to her sole and separate use," are not necessary; but they must be such words, which show a decided intention that the husband shall have no interest whatever therein. 5 Ves., 557. A legacy, to be paid into the proper hands of the wife, is her separate property. 5 Ves., 545. (1)

(1) But the intention of the testator, to deprive the husband of any benefit from the legacy must be clear, and apparent on the face of the instrument conveying it, or his right will not be excluded. Thus, a devise "in trust to sell, and out of the produce to purchase in the trustees' name, an annuity for the wife of D. and to pay the same to her and her assigns," was held not to exclude the husband's right, though living apart from his wife. *Dakins v. Beresford*, 1 Ch. Cas., 194; see, also, *Carroll v. Lee*, 3 Gill and John., 594; and a direction "to pay to her, to and for her own use," and a legacy to a woman "for her own use and benefit" were held not to give a separate interest to the wife to the exclusion of the husband. *Jacob v. Amyatt*, 1 Madd., 376; and see 3 Vesey, 186; 5 id., 517. But a legacy to a *feme covert* "for her own use and at her separate disposal" vests in her a separate estate. *Pritchard v. Ames*, 1 Turn. and Ry., 222.

Held in the following cases, that no particular words were necessary to create a separate estate; but that it is only necessary that the deed should clearly manifest the donor's intention to exclude the marital rights of the husband. *Beaufort v. Collier*, 6 Hamph., 437; *Newman v. James*, 12 Ala., 29; *Clerke v. Windham*, id., 798. But the deed must convey an intention to exclude the marital rights of the husband. *Welch v. Welch*, 14 Ala., 76. A gift to a trustee for the use of a married woman does not create a separate estate. *Ibid.*: and see, also, *Fritt's adm'r v. Oseltwoit's adm'r*, 32 Penn., 226. It was held in Pennsylvania, that the married woman's act of 1848, was intended to provide against the liability of her estate for her husband's debts, but not to give her the absolute right to dispose thereof as a *feme sole*, without her husband's consent. *Pettit v. Freck*, 33 Penn., 118. And it was held, that, under the act of 1848, a married woman may have a separate estate not subject to the control of her husband, but it is necessary that she own it as hers before marriage, or that she acquired it afterwards, and it must be shown in what

It has, likewise, been a question, where separate property has been given to the wife without the intervention of trustees, whether the intention of the testator, or grantor, could be carried into execution so as to prevent the creditors of the husband from intermeddling.

Lord COWPER, in the case of *Harvey v. Harvey*, P. Wms., 125, seems to suppose that trustees were necessary; but I take it not to be necessary to name any person as trustee; and, in such case, the law considers the husband * as trustee, and in [*164] that character he must hold the property for his wife. In P. Wms., 316, it was holden that, where a *femme couverte* was devisee of lands, to her separate use, and no trustees were appointed, that her husband was trustee; and, although the husband had become a bankrupt, yet the devised premises were not subject to

manner she acquired it. Mere evidence that she purchased it, is not sufficient. The presumption is that the purchase is with funds of her husband. *Bradford's Appeal*, 29 Penn., 513; *Topley v. Topley's adm'r*, 31 id., 328; *Walker v. Beanny*, 36 id., 410; *Gillespie v. Miller*, 37 id., 247. To enable a married woman to acquire and hold property against the creditors of her husband, she must make it clearly appear, that the means of acquisition were her own independent of her husband. *Auble's adm'r v. Mason*, 35 Penn., 261. Money received by the husband from his wife's estate, is presumed to have been received for her, and an agreement to repay it, will be binding on the husband's estate. *Johnston v. Johnston's adm'r*, 31 Penn., 450. Where a married woman purchased a livery stock from her father as her separate property, and carried on the business in her own name, her husband serving her as hostler, without contrivance or collusion between them, it was held, that such a case was within the married woman's act of 1848. And that the act did not require the use and possession of the property by the wife, to be exclusive of her husband. *Manderback v. Mock et ux*, 29 Penn., 43. Held in New York, that the property, which a married woman may hold as her separate estate, under the acts of 1848, 1849, must be acquired by inheritance, gift, grant, devise or bequest from some person other than her husband. *Rider v. Hulsa*, 33 Barb., 264. The fruits of her own labor, or the profits or income of any business in which she may have embarked, do not fall within the meaning of those statutes. *Ibid.* But, as to the fruits of her labor and business, see statute of 1860, ch. 90, page 157, of Laws of New York, 1860. When a promissory note is indorsed over and delivered to a married woman by the payee, the property in the note vests in her according to the statute for the acquisition of property by married women. *Dillaye v. Parks*, 31 Barb., 132. And it was held in *Gage v. Dauchy*, 38 Barb., 622, that the wife may confer upon her husband the use or income of her separate estate as a gift; and her acquiescence or assent to his receipt, or use by him is evidence of a gift by her.

Held, in *Maine*, that the act of 1847, embraces all rights in real estate, which the

the bankruptcy, for his interest therein was only that of a person holding the legal title as trustee solely for the benefit of another. This doctrine is confirmed in *Bunbury*, 187, and in a case in 3 *Atkins*, 399; and there is a case in *Bunbury*, 205, where it was held that a gift from the husband to the wife, for her separate use, was valid, and the husband became, in equity, a trustee of this property for his wife. (1)

A gift to a son's wife, on the wedding-night, (a) by his father, of diamonds, has been held to be her separate property, and not *paraphernalia*.

(a) 3 *Atk.*, 399.

wife shall acquire during coverture as well as those acquired before coverture, and that the word grant applies to all conveyances by deed which are not gifts. *Peck and o'rs v. Walton*, 26 *Vt.*, 82. A separate estate may be vested in a *feme sole* as well as in a married woman, which will be good against the husband's marital rights after marriage. *Feers v. Brooks*, 12 *Geo.*, 195.

A testator, by his will, gave to A., a married woman, an annuity for life, for her separate use, and by a codicil, gave to A., in addition to the legacy mentioned in his will, the sum of 300 pounds. No legacy had been given to A. by the will. Held, that A. was entitled to the 300 pounds for her separate use. *Warwick v. Hawkins*, 13 *Eng. Law and Eq.*, 174.

(1) 'That property may vest in the wife, without the appointment of a trustee, is the doctrine of all the late leading cases, and, where there is no trustee appointed, the husband will be considered as such, at least in equity. *Hawkins v. Coulter*, 2 *Porter's Ala. Rep.*, 463; *Picquet v. Swan*, 4 *Mason's Rep.*, 455; *Carroll v. Lee*, 3 *Gill & John*, 504; *Wallingsford v. Allen*, 10 *Peter's Rep.*, 583; see, also, *Tyler v. Lake*, 4 *Simons' Rep.*, 144. In *Faulkner v. Faulkner* (says *Ch. J. Kent*, in 2 *K. C.*, 163, in *note*), 3 *Leigh's Virg. Rep.*, 355, it was decided that, at law, a marriage settlement, without the intervention of a trustee, would not avail to secure the property to the wife as against the husband; and such is also the doctrine of *Simpson v. Simpson*, 4 *Dana's Ky. Rep.*, 141, where it is said that, though a valid agreement between husband and wife for a separation, and for a separate allowance for her support, might be made through the intervention of a trustee for the wife, and by whom the contract may be enforced; but that, when there was no third party, no suit could be maintained, either at law or in equity, on such contract. The case in Kentucky has certainly some strong reasons for its support; for, in entering upon this subject, the difficulty of enforcing the contract as against the husband, and at the same time preserving the symmetry of the law unimpaired in other respects, at once presents itself. The wife cannot, certainly, sue the husband at law, nor can she institute an action against a debtor of the husband without joining him. How, then, can the contract be enforced against the husband, if he chooses to break it? The answer is plain, and herein is the mistake of the Kentucky case. Chancery will lend its assistance, without which the wife would be

The husband binds himself to a stranger to pay to that stranger £20, for the use of the wife: if he do not pay, the stranger can enforce the payment, and is trustee of the money for the separate use of the wife. 1 Roll. Rep., 334. So a gift of trinkets by the husband to the wife, and, also, a gift by a stranger to the wife, have been viewed in the same point of light. (a)

A gift by the husband to the wife has been supported as giving a separate property to the wife; (b) and articles of agreement betwixt them, respecting such property, have been holden good. Technical terms are not necessary to create this separate property. If it can be inferred from the words of the conveyance that it was the intention of the grantor that she should have the things granted to her separate use, this is sufficient. (1)

The husband left his wife, with two small children, and went abroad, without affording any support to his wife; and, after an absence of fourteen years, returned. His * wife, in his [*165] absence, by the assistance of her friends and her industry, supported her family, by the business of a milliner; and also

(a) 3 P. Wms., 394.

(b) 3 Ver., 659.

utterly remediless. When the husband, in contemplation of marriage, conveys personal estate directly to his intended wife, there is no doubt that on his death, it goes to her heirs, and his marital right does not attach upon it. *Allen v. Rumph*, 2 Hill's Ch. Rep., 1; but if, during coverture, the husband disposes of it, the wife can have no remedy at law; but if the case can once be brought within the reach of a court of chancery, the rights of the wife will not fail of receiving an adequate protection. That in such a case the wife might, by her next friend, exhibit her bill in chancery against him, has never been doubted. And we shall hereafter see that this right of hers has often been recognized. It is enough for our present purpose to cite *Am. Chan. Dig.*, 538; *Fry v. Fry*, 7 Paige's Ch. Rep., 461.

(1) *Brinkman v. Brinkman*, cited in 3 Atk. Rep., 394; *Graham v. Londonderry*, id., 393; *Rich v. Cockell*, 9 Ves., 369; and, in a late case, it has been held that, where the husband, after marriage, agreed, in writing, to settle a part of the wife's property, before marriage, upon her, the agreement was held to inure to the benefit of the children, and that the wife herself could not waive it. *Fenner v. Taylor*, 1 Simons' R., 169.

Though a conveyance from a stranger to a *feme covert*, in order to vest in her a sole and separate estate, must contain words indicating such intention, yet a gift of personal property, made in good faith, by a husband to his wife, will be sustained in equity as her separate property, where there are no creditors to be injured. *Deming v. Williams*, 26 Conn., 226.

saved small sums, which she loaned, and took bonds. Her husband, after his return, broke into her shop, and took away the property there found, and the bonds. The wife applied to chancery for the redelivery of the property to her. The court of chancery decreed that this property, so carried away, was the separate property of the wife, and at her disposal; and ordered a redelivery of it to the wife. This is a case *sui generis*; and no man can doubt of the equity of the decision. But it is difficult to reconcile it to any known principles of law: it seems to be *casus omissus*.

The separate property of the wife is liable for her contracts made during coverture; and, by process in equity, such property may be reached. (a) But she is not liable to a judgment, on which execution issues; for, in this way, her person might be subjected to execution, and thus the husband's right to her person would be violated. (1) There is a case reported in 14 Ves., 442,

(a) 3 P. Wms., 144; *id.*, 38; Brown in Can., 16.

(1) There is a conflict of authorities in different States as to the question, how far and in what cases a married woman's contract binds her separate estate. It was decided in New York that, in order to create a charge upon the separate estate of a married woman, the intention to do so must be declared in the very contract which is the foundation of the charge, or the consideration must be obtained for the direct benefit of the estate itself. And, therefore, a woman, who executed a note with her husband as his surety, did not charge her separate estate. *Yale v. Dederer*, 23 N. Y. (9 Smith), 450. See also the following cases to the same effect: *Gardner v. Gardner*, 7 Paige, 112; *Vanderheyden v. Mallory*, 1 Comst. (N. Y.), 462. When the wife expressly charges her estate, or makes a contract for its immediate benefit, it is well settled in New York, as well as elsewhere, that such estate is bound. See cases *supra*; and, also, *Colvin v. Carrier*, 23 Barb., 371, in which it was held that, where labor is performed and materials furnished by a carpenter towards the erection of a building on land belonging to a married woman, to the increase of her separate legal estate, such separate estate might be charged in equity with the debt. It has been held that her separate estate is liable for debts contracted before coverture. *McKay v. Allen*, 6 Yerger, 45. And it was held in Pennsylvania that the provision in the married woman's act of April 11, 1848, that it should not be construed to protect her property from liability for debts contracted by herself, has reference only to debts contracted before marriage. *Glyde v. Keister*, 1 Grant's Cases, 465. And in *Pettit v. Fretz*, 33 Penn., 118, it was held that a married woman has no power, under the act of 11th April, 1848, to dispose of or charge her separate property by any instrument under seal to which her husband is not a party. But in the case of *Vanderheyden v. Mallory*, *supra*, it was

which proves she cannot defend herself on a presumed coercion, as it respects such property, where a wife made a grant of an annuity out of her separate property for the benefit of her husband. The grant was established, although the purchaser had notice from her trustee that he would pay the separate property to no person but to the wife only; for she complained that she made it from fear of her husband, who treated her harshly, that he might procure the annuity. The principle on which the court proceeded doubtless was, that a wife, as to her separate property,

held that the wife's separate estate was not liable for her debts contracted *duo volis*, unless she *charge it* in accordance with the principles there laid down. See, also, *Yale v. Dederer*, and other cases cited, *supra*. Under the statute of 1860, of New York, a married woman may carry on any trade or business in her own name, make contracts in reference to such business, and sue and be sued, as if a *feme sole*. And, so far, her estate will be held liable for her contracts. Laws of New York, 1860, ch. 90. So also in Pennsylvania, a married woman may become a *feme sole* trader under the act of 22d February, 1718; and, by the act of May 4, 1855, "whosoever any husband, from drunkenness, profligacy or other cause, shall neglect or refuse to provide for his wife, or shall desert her, she shall have all the rights and privileges secured to a *feme sole* trader under the act of 1718." *Purdon's Supp. Laws of Penn.*, 1854, 1856, page 1136, sec. 2. See provisions of statutes of different States, under note 1, p. 49, *ante*.

In *Doty v. Mitchell*, 9 Sm. & Marsh., 435, it was held that a wife does not charge her separate estate unless such intention be clearly expressed in the instrument, or unless the instrument conferring such estate constitutes her a *feme sole*; and she must follow the particular mode there pointed out in the disposition of such estate.

It was held, in the following cases, that, where a *feme covert* borrows money and executes a bond, or enters into a bond conjointly with her husband as a security for his debts, this will give a foundation to demand the money out of her separate estate, and her declaration may, in such case, be read in evidence: *Bell v. Montgomery*, 2 Ves., 190; *Morton v. Turville*, 2 P. Wms., 144; *Hulure v. Tenant*, 1 Bro. Ch. Cas., 26; *Jacques v. M. E. Church*, 17 John., 348; *Demarest v. Wyncoop*, 2 John. Ch. Rep., 129. And it was held that where a married woman, having a separate estate, executes a note in her own name, it is *prima facie* evidence that the goods were furnished on the faith of her promise. *Vance v. Wells*, 8 Ala., 399; see, also, *Comeriat v. Goldsmith*, 6 Ga., 14; *Ozley v. Ikelsheimer*, 26 Ala., 332; *Jarman v. Wilkerson*, 7 B. Monr., 293; *Whiteside v. Cannon*, 23 Mis., 457; *Coats v. Robinson*, 19 Id., 757; *Dobbin v. Hubbard*, 17 Ark., 189. In Texas, it was held that a married woman's separate estate was bound for the payment of a promissory note, executed by her for goods, wares and merchandise furnished to her and her family. *Edrington v. Mayfield*, 5 Texas, 363. See, also, *Collins v. Lavenburgh*, 19 Ala., 682. And, perhaps, the same doctrine would be held good in

is a *femme sole*; and must so be considered, in all her actions respecting it, to act freely and without coercion. Actual proof of duress or imposed hardship on the part of the husband would be sufficient in chancery to rescind her contracts respecting it, in [166] the same manner and * for the same reasons that the contract of any other person is rescinded. (1)

A wife advances her separate property to relieve an incumbrance from her husband's estate, and takes a receipt for the money, and the husband dies: she shall stand in the place of the mortgagee, and the heir shall not have such estate unless he redeems it from the wife, by paying the money so advanced. If she had not taken the receipt, it might have been viewed as a gift from the wife to the husband; and analogous to this, are the cases where a wife has permitted her husband to use her separate property. (2) If it appeared from evidence, that she had claimed that her husband was debtor to her on this account, or that he

Pennsylvania, and other States, where the wife's separate estate is made liable for necessities, when no property of the husband is found. See Dunlop's Laws of Pennsylvania, 1700, 1849 (act of 11th April, 1848), page 1125, sec. 8. It was held in *Haygood v. Harris*, 10 Ala., 291, that the separate estate of a married woman is not liable at law, during coverture, for the payment of debts contracted before or after marriage. In *Hampton v. Catlin*, 20 N. Y. (6 Smith), 247, it was held that the mechanic's lien attaches to the separate property of a married woman. This is on the ground that the contract was for the direct benefit of her separate estate. And a married woman, holding stock in a bank, is liable as a stockholder under the act of 1849, ch. 226. In the matter of the Reciprocity Bank, 22 N. Y. (8 Smith), 9.

(1) The case of *Grigby v. Cox*, 1 Ves., 517, is also to the effect that to avoid the contract of a *feme covert* with regard to her separate property, when made in favor of the husband, chancery will require express proof of his coercion. In equity she is looked upon, with regard to her separate property, as, to all intents and purposes, a *femme sole*, and the same duress that avoids the contract of a person laboring under no other disability, and nothing less, will avoid hers.

(2) So in the case of a mortgage of her separate real estate for his benefit, the mortgage, as between the husband and wife, will be considered the debt of the husband, and after his death the wife, or her representatives, will be entitled to stand in the place of the mortgagee, and have the mortgage satisfied out of the assets of the husband's estate. *Clinton v. Hooper*, 1 Vesey, 186, *per* Lord THURLOW.

And it was held in New York, that a wife who joins with her husband in a mortgage of her own property to secure his debt, or the payment of money loaned to him, is the surety merely, of the husband, and is entitled to all the rights and privi-

had recognized as such, by proposing to pay her, she is considered, on the death of her husband, as a creditor. (a) But if she have advanced her money towards the maintenance of the family, and made no demand of the husband, she shall not be considered as a creditor; but that the advancements so made by her, were intended for the benefit of the family. (b)

When the husband and wife agree that her separate property shall be paid to her husband, chancery will execute such agreement, by directing the trustees to assign such estate to the husband.

When a wife has a separate personal property, she may appear in court, and request that the whole of her property should be paid to her husband; and the court will order the trustees of such property, so to do. (1)

(a) 1 Atk., 300.

(b) 1 P. Wms., 82.

leges of a surety. *Vartie v. Underwood*, 18 Barb., 561; *Neimcewicz v. Gahn*, 3 Paige Ch., 614; *Hawley v. Bradford*, 11 Wend., 312.

Where the husband and wife lived together, and the wife permitted the husband to receive the profits of her separate estate, and apply them to the support of the family and the expenses of housekeeping, it was said by the court that the presumption was, that she intended them as a gift to the husband. *McGlinsey's Appeal*, 4 Serg. and Rawle, 64; and see also *Jacques v. M. E. Church*, 3 John. Ch. Rep., 77; 17 John., 548; *Moore v. Ferguson*, 2 Munf., 421; *Grimké v. Grimké*, 1 Desaus. Ch. Rep., 266; *James v. Mayrant*, 4 id. 602.

But in Pennsylvania, it was held, that money received by the husband from his wife's separate estate, after the act of 1848, is presumed to have been received for her, and an agreement to repay it will be binding on the husband's estate. *Johnston v. Johnston's estate*, 31 Penn., 450.

(1) This is not to be received without some limitation. In some of the older cases this doctrine was carried further than it has been at a later period. Thus in *Willots v. Cay*, 2 Atk., 67; where the husband was insolvent, the master of the rolls ordered the wife's whole fortune to be paid to him, she being in court and giving her consent; and in *Pearson v. Brereton*, 3 Atk., 71, the court ordered money left in trust for the wife and her heirs, to be laid out in lands, to be paid to the husband, with the consent of the wife, without being laid out in lands; and a legacy given to the wife for her sole use, with a power of appointment by will, and in default of appoint, to her executors, was ordered upon her consent to be paid to her husband. *Newman v. Cartoney*, cited in 3 Bro. Ch. R., 568. And stock, standing in the names of trustees, under a settlement, the dividends to be paid to the wife, or to such uses as she should from time to time appoint, the principal to be transferred after her death to the husband, was ordered with her consent to be paid, though there was no appointment to the husband. *Clark v. Pister*, 26th March,

In the case above cited from 2 P. Wms., 82, the case was, that previous to the marriage, it was agreed betwixt husband and wife, that she should assign all her mortgages to trustees for her separate use: which was done, and the marriage took effect, and they lived together in the marriage state ten years, when the husband died; and during this period she had suffered her husband * to receive the interest due on mortgages and bonds, [*167] her separate property, without complaint. It was adjudged by the court, that for the interest so received, she had no claim upon her husband's executors. The same case is recognized in 2 P. Wms., 841.

When a wife calls in her separate property, and places it out on interest in the husband's name, and the husband dies, it will be considered as a present from the wife to the husband. It seems to me, that the correctness of this principle is questionable. I do not perceive whence it is to be inferred that she did not intend that her husband should be trustee for her.

When money, in the hands of a trustee, for the separate use of the wife, comes into the hands of the husband by permission of the trustee, with or without the consent of the wife, and the husband purchases therewith an estate, the estate so purchased

1778, cited as above. But if personal property is, before marriage, conveyed to trustees, in trust for the wife, if she survives the husband, without any power of disposition reserved to her, by the settlement, chancery has no jurisdiction to direct a transfer of the property to the husband with the consent of the wife. Perhaps this distinction may be noticed between this and the cases above cited. In these the marital right of the husband is allowed to operate unobstructed, by the equitable claim of the wife to a provision, when she does not oppose that equity to it, and the equity being out of the way, his right stands unqualified. But here there is no right on the part of the husband, and no power of disposition of her contingent interests on the part of the wife. *Richards v. Chambers*, 10 Vesey, 580. See also *Speiling v. Rochford*, 8 Vesey, 164; *Woollands v. Croucher*, 12 id., 174. But stock settled to her separate use may be transferred to him, with her consent. *Chealyn v. Smith*, 8 Vesey, 183; *Ellworthy v. Wickstead*, 1 Jac. and Walk., 69.

See, also, *Gage v. Dauchy*, 28 Barb., 622.

Where the wife has a power of appointment over a personalty in a marriage settlement, the court will carry her deed into effect, conveying it to the husband, but even here the court will refer it to a master, to examine the wife privately, explain her rights to her, and ascertain whether she voluntarily consented, and still consents to the deed. *Whittall v. Clark*, 2 Edwards, 149.

will not be liable to the trust, where the trust does not appear upon the face of the deed; unless the application of the purchase money can be clearly proved. But there is no room for the application of supposed possible coercion, as in other cases.

If the settlement of separate property on the wife be so made, that it appears that the donor intends to restrain the wife from an unlimited absolute disposal of it, this will disable her from charging her separate property, without the consent of the trustees. Upon this ground, the case of *Muir v. Huish* was decided. I know that Lord ROSLYN, in that case, observed that there was no power of appointment reserved to the wife. He lays hold of this circumstance, as affording some aid to his decision; but the case was not determined on that point. If it were, it was a decision directly opposed to a decision in *1 Vesey, jun., 46*, and *9 Vea., 620*. The direction of the donor in the case of *Muir v. Huish*, was, that the trustees should receive the rents and profits, to pay them * to the wife, *when, and as they were received*; [*108] or otherwise, in their discretion, to permit her and her assigns to receive them during her life, for her separate use. No person can read this trust, without perceiving that the wife had not an unlimited power to dispose of this separate property; but the wife, in consideration of three hundred pounds, paid to her husband, granted an annuity of forty-five pounds, charged upon the trust estate of the wife. The trustees informed the grantee of the annuity, that they would not pay it; that the husband was a bankrupt. The grantee filed his bill against the trustees, the husband and the wife. Lord ROSLYN dismissed the bill, with costs. It is not now a disputable point, I apprehend, whether a wife, when she is laid under no restraint by the settlement of the property, can or cannot dispose of such property as she pleases, independent of the will of the trustees. Trustees were not appointed to control her in what respects the property, but to guard against the husband. She can, therefore, dispose of it to whom she pleases; and the trustee will be obliged to convey or pay, as the case may be, to her appointee, as she directs. (1)

(1) The rule is now firmly established, that the extent of the power of a married woman over her separate estate is determined, absolutely, by the nature of the

It is now settled that, where there is no express power of appointment over her separate property reserved to the wife in the instrument granting the separate property, that, if she joins in a bond with her husband, her separate property is liable to

instrument creating such estate. The decisions upon this subject have been somewhat fluctuating, and restraints against anticipation have been sometimes held void. The English rule formerly was that in cases of property in trust for a married woman, to be paid into her hands upon her own receipts, the wife might still dispose of her interest, and her assignee would take it. *Hulme v. Tenant*, 1 Bro. Cas. in Chan., 16; *Pybus v. Smith*, 1 Ves., 189. In *Lockett v. Wray*, 4 Bro. Rep., 483; *Brandon v. Robinson*, 18 Ves., 434; and *Jackson v. Hobhouse*, 4 Merivale, 487, such a clause against anticipation was held to be valid.

But the tenor of the later English cases is against the validity of such a clause against anticipation, and it has been held that such a clause inserted in a will in favor of an unmarried female, and having no connection with coverture, is void. For this, see *Woodmeston v. Walker*, 2 Russ. & Mylne, 197; *Brown v. Pocock*, *ibid.*, 200; *Jones v. Sadler*, *ibid.*, 208; *Newton v. Reed*, 4 Simons, 141. In *Lee v. Muggeridge*, 1 Ves. & Beames, 118, it was held, that where a married woman stipulated, that in the event of her surviving, the property should be hers, reserving no power of disposition of it during coverture, that she could not dispose of it while covert. But a trust to permit a married woman to receive interest, or dividends of stock, to her own use for life, independent of her husband, was held to entitle her for life to the separate use, and upon the rule that a *feme covert* is to be considered sole with respect to her separate property, her assignment to secure an annuity with her husband was established. *Wagstaff v. Smith*, 9 Ves., 530. The doctrine is well established, however, that she is a *feme sole* only so far as she is made so by the instrument creating her separate estate, though some decisions are to be found which militate against it. Such was the opinion of Ch. J. KENT, in *Jacques v. Meth. Ep. Church*, 1 J. C. R., 450; and, although his decision was reversed, on appeal to the court of errors, yet, with all deference to the opinion of that body, it is but too certain that the opinion of Judge KENT is best sanctioned and supported by the authorities. *Morgan v. Elam*, 4 Yerger's Tenn. Rep., 375; *Ewing v. Smith*, 3 Desaus., 417; *Lancaster v. Dolan*, 1 Rawle, 231; *Thomas v. Folwell*, 2 Whart., 11. If this doctrine is once established, then *a fortiori* she cannot dispose of her separate estate in violation of a restraining clause in the instrument creating, because so far as that restrains her, she is not a *feme sole*, and unless she is so, she cannot convey.

But where she is not restrained by the instrument creating the estate, can she dispose of it without the concurrence of her trustee? On this point there is no question, for it has been repeatedly held that she may, unless their joining is made necessary by the instrument. *Grigby v. Cox*, 1 Ves., 517; *Essex v. Atkins*, 14 Ves., 547; *Glyn v. Baster*, 1 Younge & Jervis, 329; *Acton v. White*, 1 Sim. & St., 429; *Jacques v. M. E. Church*, 17 John., 548; *Bethune v. Beresford*, 1 Desaus., 174.

Where a testator devised to a trustee and the heirs of the trustee certain real

pay such bond. This, Lord ROSLYN acknowledges, in 2 Ves., Jr., from 142 to 250. This point was so determined, 2 Atk., 68. So, too, where a *femme couverte* gave her own bond, having separate property, and died, and left a will and executors, it was decreed by the chancellor that the executors should pay this bond. 2 P. W., 146. The case in 1 Brown in Can. is the case of a bond where the wife, having separate property, joined with her husband in a bond for a sum of money borrowed by him and her. We are told that * all these cases were decided on the ground [*169] that the wife intended to charge her separate property; and that, when this presumption fails, equity will not subject her separate property to the payment of her contract. For this purpose, a case in 9 Vesey is relied on. A married woman, in order to raise the sum of two hundred and ten pounds, sold an annuity of thirty-five pounds to A, to be paid out of the rents of a trust estate of her separate property; and she and her husband directed the trustees to pay that sum annually to A. It so happened that the grant of the annuity was void, for want of conformity to the annuity act. All the necessary requisites to render the grant valid, according to that act, had not been observed. The two hundred and ten pounds had been received by the husband, and ought, in equity, to have been repaid; and for the recovery of it an action at law, for money had and received, had been maintained. And the question now arose, shall the wife's separate property be subjected to the payment of this sum? It is said that it ought not; for that she never intended to charge her estate with a gross sum, but with an annual payment. It seems to me, whatever might have been her

estate, for the separate use of his daughter, then a married woman, during her life, and after her death to the heirs of said daughter in fee simple, and the daughter afterwards became discover; held, that according to the rule in Shelly's case, the daughter had an estate in fee simple, which would pass by her deed to her alienee. *Stacy v. Rice*, 27 Penn., 75. And it was held in *Whichcote v. Lyle's ex'rs*, 28 Penn., 73, that a devise to a trustee in trust for the separate use of the testator's granddaughter, not then married or contemplating marriage, vests a complete legal estate in the granddaughter clear of the trust. Under the act of 1848, of Pennsylvania, it was held, that a married woman is not vested with the unlimited powers of a *feme sole*. *Mahon v. Gormley*, 24 Penn., 80; *Pettit v. Fretz*, 33 Penn., 118.

intention, that it would not alter the case, so that it could be recovered out of her separate property: the annuity was void; it was as if it never had been. How, then, is the wife liable? Why is it, when an annuity is void, that the consideration-money which has been paid may be recovered back? Surely it is, that the consideration on which it was paid has wholly failed: the holder of the money is bound to return it. The holder, in this case, is the husband only. It is impossible to say that any other person beside the holder should be liable. It is difficult for me to discover why we should have any other evidence of intention in a *femme couverte* to pay her debts * which she contracts, [*170] having separate property, than that which we discover in other persons; or why it is not sufficient to subject her to the payment of any debt that she contracts, as others are subject to the payment of their debts, because they contracted. This question, viz., whether her separate property is liable for a debt which she did not intend should be discharged by it. That her separate property is liable when she intended it should be, seems a point agreed to. And it is admitted that, if contracting a debt is of itself sufficient evidence of an intention to pay it, that her property is bound. The fair presumption in such case is, that she intended to pay the debt, unless it was such a debt as her husband was bound in point of law to pay; or else we must presume that she intended to commit a fraud. For this we have no warrant. The man who acknowledges that he owes a debt, and says nothing more, is presumed to promise to pay it; and such promise will take such debt out of the statute of limitations. So, too, the married woman, who has property to pay a debt, furnishes sufficient evidence, by the act of contracting the debt, that she intends to pay it. If this point depended upon the question, whether the contracting a debt by a wife, having separate property, furnished evidence of her intention that such property should be applied to the fulfillment of her contract, I think the conclusion is a fair one, that it does furnish evidence of such intention. But I cannot conceive of any reason why we look for intention in the case of a *femme couverte*, more than in any other case. It is a point settled, that, in chancery, a *femme couverte*

has the same dominion over her separate property as a *femme sole* has over her property, or as any other person has. She can convey or devise it, or do any other act respecting it, that any other person can do. She is not considered as being under any control that has the smallest influence * on her transactions with this property. In point of authority, there does not [*171] seem to be anything very decisive. The Master of the Rolls, in 2 Atk., 379, doubts whether a married woman's separate property could be subjected to the payment of a debt which she contracted with some workmen in repairing a house, and which she promised to pay. He did not, however, decide the point; for she submitted to pay, and he then decreed payment. In a case in 2 Ves., Jr., Lord ROSLYN, after admitting that her property would be bound by her assignment, or where she enters into a bond with her husband, concludes that a general creditor of the wife could not subject her separate property in chancery to the payment of his claim. On the other hand, it clearly appears, in 1 Brown in Can., 16, to have been the opinion of Lord THURLOW that her separate property was liable to the payment of any debt which she should contract. (1).

(1) Notwithstanding this ingenious reasoning of the author, the authorities are clear that there must be an expressed or implied intention on the part of the wife when she binds herself with her husband, or her separate property will not be liable, and that the mere fact of her having entered into the contract is not, of itself sufficient evidence of such intention. If the contract is for necessities for her use, in that case the contracting of the debt would be sufficient to charge her separate estate. *Hearty v. Thomas*, 15 Ves., 596; *Bulkin v. Clarke*, 17 id., 305; *Stuart v. Lord Kirkwall*, 3 Madd., 387. Lord THURLOW, in *Hulme v. Tenant*, 1 Bro. C. C., 16, seems to have been of opinion that general creditors could come upon her separate estate without proving that the creation of the debt was for the benefit of her separate estate and intended as a charge upon it, considering the liability to general engagements as a necessary incident to a separate estate, arising from the capacity to contract which a separate estate confers. But subsequent authorities limit the liability to cases where the contract is entered into with the intention of charging the estate, in which cases the courts treat the charge as an appointment by the wife of her separate property. *Mills v. Airey*, 1 Ves., 217; *Bolton v. Williams*, 2 id., 150; *Sperling v. Rochefort*, 3 id., 175; *Jones v. Harris*, 9 id., 487; *Parker v. White*, 11 id., 339; *Bethune & Cook v. Berensford*, 1 Desaus., 174.

In New York, in order to create a charge upon the separate estate, the intention to do so must be declared in the very contract which is the foundation of the charge,

No action at law can be maintained against her. For the judgment in that case would subject her person to imprisonment; and thus the husband's right to the person of his wife would be infringed, which the law will not permit in any case of a civil concern. And, for the same reason, there can be no personal decree against her in chancery. It must be one that reaches her property only. (1)

Whatever may be disputable respecting the power of the wife, independent of her trustees, over her separate property vested in trustees, or the extent of her liability, on account of that property, to fulfill her contracts, certain propositions are indisputable:

1st. When a *femme couverte*, having separate property, enters into a contract with intention to subject such property to the fulfillment of her contract, a court of equity will subject it, by a decree, to satisfy such contract.

[*172] *2d. When property is given to her for her separate use, and she is to receive, through the intervention of trustees, and no restraint laid upon her, this property is not subject to the control of the trustees, but is subject to her control.

3d. A *femme couverte* may make any disposition of her separate property that a *femme sole* can make.

4th. If she should assign her separate property, the trustees would be compelled, in chancery, to convey the legal title to such assignee, or pay over the rents, &c., as the case may be, to her assignee. 1 Ves., 517; 3 Bro. in Can., 840-846; 9 Ves., 520.

The same principle applies to the purchase of an estate by any trustee, with the trust money, or by an executor, with assets. Although, when there is no trust declared upon the face of the deed, parol testimony is not admissible to prove an express contract for the purpose of showing that there was a trust, yet facts may be proved by parol, from which such contract is fairly

or the consideration must be obtained for the direct benefit of the estate itself. *Yale v. Dederer*, 22 N. Y. (8 Smith), 450. And see note to page 260. A married woman is not liable for a debt contracted for the avowed purpose of improving her separate estate, unless it is shown that the money was applied to that object. *Hough v. Jones*, 32 Penn., 432.

(1) See preceding note and cases there cited.

implied to have existed—facts which are unequivocal, and speak a language that cannot be mistaken, the existence of which cannot be reconciled upon any other hypothesis than the existence of such contract. 1 Bro. in Can., 287; 2 id., 297; 1 P. Wms., 84, 163, 168, 171; Ambler, 409–412; 1 Atk., 59; 2 Ver., 167. (1)

Whether a wife can dispose of her separate real property by deed, where there are trustees, without their joining, seems not to be settled. As to her personal estate, her power in this respect is not to be questioned. (2)

When it is necessary to institute a suit in chancery, respecting her separate property, it is brought in the name of the trustees. If she has separate property, and there is no trustees, she will institute the suit in the name of her husband and herself; if he do not refuse to have his name used. And on judgment in their favor, the * court will direct, that the money [*178] received shall be paid to a trustee, for her sole benefit. If the husband will not lend his name, she may sue by a *prochein ami*. The reason of this rule, is, that the opposite party may have security for cost, if he should prevail in the suit. (a)

A wife, having a separate property, may be sued in a court of equity, as a single woman, and proceeded against without her husband.

The wife, with respect to her separate property, may, in equity, sue her husband by *prochein ami*.

When she sues to recover her separate maintenance, she sues alone. The rule is, if a wife demand relief, when a separate

(a) 2 Ves., 452.

(1) Vide note 1, page 265, and cases there cited.

(2) *Vizzonnan v. Pegram*, 2 Leigh, 183; *Jacques v. M. E. Church*, 17 John., 548; *Mcgrath v. Robinson*, 1 Desaus., 445; 2 Kent's Com., 162 to 168; Bac. Abr., tit. Bar. and Femme, M.

Under the act of 1848, in Pennsylvania, it was held that a wife could not dispose of property held by trustees for her separate use. The kind of separate estate created by that statute is a legal one, and totally distinct from an equitable separate estate. The act creates a new kind of separate estate without abolishing the old one. Penn. Co. for Ina. v. Foster, 35 Penn., 134. In New York, it was held, that a *feme covert*, with respect to her separate estate, is to be regarded as a *feme sole* and may dispose of her property without the concurrence of her trustees, unless

maintenance has been settled upon her, by her husband, she may, in equity, sue him in her own name. (1)

In the case of *Moor v. Moor*, reported in 1 Atkyns, the wife left her husband, disputes arising, and went abroad. The husband, in consideration of marriage, and a large portion received with her, had conveyed lands to trustees upon trust, to pay one

she is specially restrained by the instrument under which she acquires her separate estate. *Jacques v. M. E. Church*, 14 John., 548. So held in *Imlay v. Huntington*, 20 Conn., 147. And this is the English doctrine. *Paris v. White*, 11 Ves., Jr., 209. In South Carolina the English rule is followed. *Erwing v. Smith and others*, Deasus, 417.

(2) The wife being considered, with regard to her separate property, in a court of equity as a *feme sole*, she becomes invested with all the necessary powers for the protection of her separate estate. She may therefore claim and enforce rights in opposition to her husband. *Mix v. Mix*, 1 John. Ch. Rep., 108; *Denton v. Denton*, *ibid.*, 110; 2 Vesey, 452; 2 Vernon, 493; *Starrett v. Wym.*, 17 Serg. and Rawle, 130. She may obtain an order to defend a suit separately. *Mix v. Mix*, *ut supra*. But a separate answer, put in without such order, will be suppressed, as having been irregularly filed; 1 Chan. Cas., 68; but see 2 P. Wms., 371. And where she institutes a suit against her husband, the court may order him to make a reasonable allowance in money to enable her to carry on the suit. 2 Kent's Com., 164. If the husband makes her a defendant in a suit in chancery he is thereby considered as having renounced his marital rights over her, and she may defend without an order for that purpose. 3 Atk., 498. But if she sues her husband, the suit must either be brought by her next friend, or by the trustees, though she may defend without such protection. 2 Vesey, 452; *Proc. in Chan.*, 324. Though her personal estate is liable for her debts contracted *dum sola*, and in some instances during coverture, and though she may be sued in equity without her husband, still the court will not make a personal decree against her for the payment of the debt, but it may, by a decree, call forth her property in the hands of trustees, and direct its personal application; and by thus stepping over the narrow limits of the law, afford a remedy to a deserving creditor, who, at law, would be compelled to lose his debt, while the debtor was amply able to satisfy it out of her property. *Hulme v. Tenant*, 1 Bro. Ch. Rep., 16; *Norton v. Turvill*, 2 P. Wms., 144; *Lillia v. Airey*, 1 Ves., 277; *Ld. Loughborough*, in 2 Ves., 148; *North Am. Coal Co. v. Dyett*, 7 Paige's Ch. Rep., 1; *Gardner v. Gardner*, *id.*, 112.

It is provided by the New York Code of Procedure, that "when a married woman is a party, her husband must be joined, except when the action concerns her separate property, she may sue alone, and when the action is between her and her husband, she may sue or be sued alone." And it may be regarded as well settled, that she must sue alone, when the action concerns her separate property. *Ackley and wife v. Tarbox and Webster*, 28 Barb., 512; and cases there cited. *Newbury v. Garland*, 31 Bart., 131.

hundred pounds annuity to the wife, to her separate use. Upon the annuity's not being paid, the trustees bring their action; and the husband files a bill in chancery, praying for an *injunction* against the process instituted by the trustees; stating, that he had offered to live with his wife; and that she had refused.

The principle, contended for by the husband's counsel, was, that her leaving her husband was a forfeiture of the annuity, that this was given in contemplation of the husband and wife living together; when the annuity would, probably, be spent in aiding the support of the family. There was no pretence of any thing in the conduct of the wife of a criminal nature, other than leaving her husband; which she justified, on the ground of harsh treatment of her by her husband. The court would not grant to the husband any relief, and directed all arrears * [*174] to be paid. The court said, that, if there had been incontinence on the part of the wife, such application would have been proper; but could not be indulged in this case, where there was no such pretence. It is not difficult to see, that, if the application had been on the part of the wife, to decree a payment of her annuity, that the court would refuse an interference, when the wife was incontinent; but I do not discover how her incontinence could authorize the court to enforce an injunction against the suit at law.

Contracts, entered into by the husband with the wife, previous to their marriage, respecting the settlement of their property, have been often decreed in chancery, although the parties contracting were minors. This doctrine in chancery, I apprehend, has arisen in consequence of the power of minors to make the principal contract; as it is a settled point, that a male is of age to contract marriage at the age of fourteen years, and a female at the age of twelve years. (a) If, therefore, they are competent to enter into a marriage contract, equity has judged it proper that they should be bound by the settlement of their property, as an accessory contract. (1)

(a) 2 Lev., 146; 2 P. Wms., 242.

(1) This is the conceded ground on which settlements by infants are sustained; if it were not, there would be no good reason why an infant could not avoid this as well as every other contract made by him. 2 Kent's Com., 243.

It will be found that, generally, these contracts, both principal and accessory, are entered into by consent and advice of parents and guardians; (a) but if a marriage be had without such consent, is it not a valid marriage, provided the married couple are of age to enter into the marriage contract? This, I apprehend, is indisputable: the person who joins them in marriage may be liable to any penalty which the law prescribes; but this does not affect the validity of the marriage. It will follow, then, if a marriage settlement is made by a minor, of his property, without the consent of his parents or guardians, it may be binding in equity; for, being competent to make the principal contract, he is also able to make that which is *accessory. [*175] It must not be understood that it is a matter of course to establish all such contracts of minors, respecting their property, as if made by adults. The court must see that such contracts are reasonable, and fairly made. If not, the court will rescind them: as in the case where the wife's estate, consisting of choses in action, was of great value; and they were given up to the husband absolutely, upon his settling upon her a jointure greatly inadequate to them. The husband soon after died, and the question was, whether the wife could avail herself of her right to her choses which remained uncollected on her husband's death. Such contract, betwixt adults, would be binding, so far as to have entitled the husband's executor to have taken the choses as the husband's estate; but this contract betwixt minors, it appearing that the settlement was greatly inadequate to the choses, chancery would not establish; but when the settlement by the husband is a competent settlement, the court will execute the agreement, although it was an agreement to convey lands. A woman, who is a minor, will be bound by her acceptance of a jointure, in lieu of dower, as much as if she had been an adult; for neither is bound, unless the jointure is a competent livelihood. (1)

(b) 2 Atk. 607.

(1) The rule was once well established that a male infant might, by an agreement before marriage, bar himself of an estate by the curtesy, or his interest in the personal property of the wife. *Slocombe v. Glubb*, 2 Bro. C. C., 545; *Strickland v.*

This subject is treated of more at large under the head of Parent and Child.

A contract entered into betwixt husband and wife, previous to marriage, that the wife shall have such property as she may acquire, during the coverture, as her separate property, is binding in equity; and such property may be conveyed by the wife, by any ordinary mode of conveyance, and it will be supported.

(1)

When a husband binds himself to do a particular thing for the wife's benefit, and does a thing equally beneficial, it shall be presumed a satisfaction: as where a husband settled long annuities to himself for life, and wife for life, *with proviso that husband, wife and trustee might sell them, and the [*176] husband alone sold them, and then settled stock of greater value on himself for life, and wife for life, this settlement was held to be a satisfaction for the long annuities. 2 Atk., 682.

A marriage settlement upon the wife and her issue, by the husband, is in a very different situation from other voluntary conveyances. The latter are always fraudulent against creditors, and it is immaterial whether the creditors are prior or subsequent to the conveyance, if the grantor were indebted at the time of the conveyance. If the grantor were not indebted at the time of the conveyance, the subsequent creditors have no claim on the estate conveyed.

Croker, 2 Cas. in Chan., 211; Warburton v. Lytton, cited in 4 Bro. C. C., 440; Atherton on Marriage Settlements, 42, 45. Such also seems to be the doctrine of Cape v. Adams, 1 Desaus., 567; and Tubb v. Archer et al.; and Randolph et al. v. Randolph et al., 3 Hen. & Munf., 399. But since the decision of Milner v. Lord Harewood, 18 Ves., 259, upon the rights of female infants, Chancellor Kent thinks this conclusion is questionable. In Milner v. Harewood, it was held, that a female infant was not bound by an agreement to settle her freehold estate on marriage, without an option, when she arrived at her majority, to refuse, though the settlement was in that case sustained against the heir, under the special circumstances. In Durnford v. Lane, 1 Bro. C. C., 106, the right of the female infant to avoid such contract is fully sustained. A legal jointure settled upon an infant before marriage is a bar of dower and an equitable provision, to take effect immediately on the death of the husband, settled upon an infant, is also a bar. Drury v. Drury, 1 Hen's Rep., 39; McCartee v. Teller and Wife, 2 Paige's Ch. Rep., 511.

(1) She may become a sole dealer or trader with the permission of her husband, even without deeds, and she becomes entitled to all her earnings, as her separate

But a marriage settlement, provided there is nothing unreasonable and extravagant respecting it, will be valid, although there were creditors at the time of making the settlement. The efficacy of such settlement, however, is limited in its operation. (a) Where a man settles an estate to himself and his intended wife, for their lives, and remainder to their issue, thus far he may safely go, and it will be secure against his creditors; but if it had been with remainder to his brothers, or other relations, it would be in their hands fraudulent against creditors. (1)

In pursuance of a rule in equity, that what is agreed to be done is considered, in chancery, as done, when, on a marriage settlement, money is agreed to be laid out in lands, and settled upon the wife and her issue, and remainder to the heirs of the wife, and the wife dies without issue, yet the heir of the wife takes the land. If the articles provided that the land should be settled on the wife and her issue, without anything further, and she had died without issue, would her collateral heir take the land? If it were her land that was thus settled, such settlement would create

(a) 2 P. Wms., 594; Eq. Ca. Abr., 254; 3 Roll., 6; 1 Vent., 198.

estate. *McGrath v. Ad'rs of Robertson*, 1 Desaus., 445. And where the acquisition of the title by the wife was fair, the husband's rescision of the contract, whereby it was acquired, cannot affect her; but she cannot hold an estate acquired by their joint fund. *Gore v. Sumersall*, 5 Monr., 512.

(1) 2 Kent's Com., 172. They are not only valid, as against creditors and purchasers, if made before marriage, but even after, if made in pursuance of a written agreement entered into before the marriage. *Osgood v. Strode*, 2 P. Wms., 255; *Bradish v. Gibbs*, 3 John. Ch. Rep., 550. Courts of equity are always disposed to give them a free and liberal construction, and will always support them if valid in other respects, unless there is particular evidence of fraud. *Horry v. Horry*, 2 Desaus., 126; *Tunno v. Trezevant*, id., 269. By statute in South Carolina, they are required to be recorded within a limited time, and also in Virginia. If not recorded in compliance with the statute, they are void against creditors and subsequent bona fide purchasers. *Wilson v. Wilson*, 1 Desaus., 401; *Forrest v. Warrington*, 2 id., 254; and so in South Carolina, even though the property was the wife's, and the settlement was recorded before the debt was contracted. *Taylor v. Herrot*, 4 Desaus., 227. See, also, 2 Dev. & Batt., 391; Statutes of Tennessee, 1831. An ante-nuptial settlement will not be affected by fraud in the settler, if the other party were innocent, if the settlement be founded upon a valuable consideration. *Magmac v. Thompson*, 7 Pet. U. S. Rep., 348.

an estate tail in the wife; and the * entailment being spent, for want of heirs, the fee simple would revert to her heir, [*177] whoever that person might be. If it were the husband's land when settled, it would vest in the husband, if alive, and, if dead, in his heir; for, the entailment being spent, the land would revert to the donor, and, if he were dead, to his heirs. Even at law, money articulated to be laid out in land is not assets in the hands of the executor; 3 P. Wms., 217; but is bound by the articles. In 3 P. Wms., 217, we find a case stated, reported in 2 Ver., 20, where, in marriage articles, it was agreed that the wife's portion of £1,500, together with the £1,500 furnished by the husband, should be laid out in lands, and settled on the husband for life; remainder as a jointure for the wife; remainder to the heirs of their bodies. The land was never purchased, and the husband died without issue. The collateral heir of the husband claimed that the money should be laid out in lands and settled on the wife for life, with remainder to himself in fee simple; and it was so decided by the court. It has been contended by some that it went to the wife as survivor, or, at least, that she was entitled to a moiety, it being purchased with her money. I apprehend the decision was correct. It is apparent that it was intended that the husband should take the whole benefit of her portion; for it was settled upon her, not as her estate, but as his; being, by him, settled as a jointure; which supposes it to be his property, which he gives to her from his estate, to bar her right of dower. In whatever point of light the case is viewed, the heir of the husband is entitled to the fee. If the rule in Shelly's case prevail, the fee was vested in the husband by the articles; but the rule of common sense prevails in the settlement of such estates in chancery. It would have been, if there had been any issue of their bodies, an estate for life in the * husband, remainder for life to the wife, and an estate tail in the issue, with a [*178] remainder in fee simple in the husband; but as there was no issue, the entailment never took place; and the estate was an estate for the life of the husband, with an intermediate estate for life to the wife, with remainder in fee to the husband; and, he being dead, this remainder in fee vests in his heir.

Marriage settlements, after marriage, if made in pursuance of articles entered into before marriage, are as valid as those made before marriage. (a) (1)

If the husband article with his intended wife to make a settlement, and marry without performing the covenant, although this contract, by the marriage, is, at law, released, yet chancery will enforce it. 2 Vent., 343. And so, if a man give a bond to make a jointure, and, though given to a trustee, so that a failure would, at law, be a forfeiture of the bond, yet chancery would view this as an agreement which should be executed specifically. 2 Chan. Ca., 88. If the husband had died before he had done it, chancery would have decreed that the heir should do it. If the husband article to settle to a certain amount in value, and fulfill only in part, chancery will decree a performance of the residue, and all his lands, in such case, are holden; but if the covenant be for particular lands of such amount in value, no other lands can be holden subject to a decree of chancery. 1 Ver., 217; 2 id., 482. (2)

(c) 2 Ves., 18; Ambl., 121.

(1) In the case of *Reade v. Livingston*, 3 John. Ch. Rep., 481, it was held that the marriage itself was a good consideration for an ante-nuptial agreement, and sufficient to give validity to the settlement. It was also held that a mere voluntary conveyance to the wife was void against creditors existing at the time, though, if made without any fraudulent intent, it was good as against subsequent creditors. Such is also the doctrine of *Sexton v. Wheaton*, 8 Wheat., 229, and *Piquet v. Swan*, 4 Mason's Rep., 443. By thus recognizing the validity of such settlements, these cases seem also to recognize the power in a court of chancery to carry the ante-nuptial agreement into execution to its fullest extent.

If property was settled upon a wife by her first husband, for her sole and separate use, and free from any control of the husband, with absolute power to dispose of it by deed or will, the settlement will be operative against the marital rights of a second husband. *Cole v. O'Neill*, 3 Md. Ch. Dec., 174.

A marriage settlement, incomplete by reason of the want of a trustee, is only an agreement to make a settlement, and will not, at law, exempt the annual crops of the wife's land from execution against the husband. *Bruce v. Thompson*, 26 Vt., 741. A marriage settlement, in compliance with a *parol agreement* before marriage, was held void as to antecedent creditors. *Borst v. Corey*, 16 Barb., 136; *Albert v. Winn*, 5 Md., 66. But a written settlement, or agreement to make one, before marriage, in consideration thereof, is valid against creditors. *Id.*

(2) *Ramsden v. Hylton*, 2 Ves., 305; *Russell v. Hammond*, 1 Atk., 13; *Brown v. Jones*, id., 190; *Laney v. Athol*, 2 id., 444; *Ward v. Shallett*, 2 Ves., 16; *Wheeler v. Caryl*, Ambl., 121.

So, too, if the husband, after marriage, receive a portion which came to his wife from some person deceased, and, in consideration thereof, make a reasonable settlement, it is good; (a) and when property is in the hands of trustees belonging to the wife, not as her separate property, and they will not pay it over until the husband makes a reasonable provision, such provision is good against creditors; for, if the husband had gone into chancery * to compel the trustees to pay it over, or deliver [*179] him such property, the court would not have decreed in favor of the husband without his making a reasonable provision for the wife. (b)

When a settlement has been made, before marriage, on the wife, (c) and afterwards she, for his benefit, joins with him in discharging it, this is a sufficient consideration for a new settlement, and, as it respects purchasers, it is not void, although of much greater value than the first settlement; but creditors cannot be prejudiced by such a transaction. 2 Lev., 70; Pr. in Can., 118. The law is the same when the wife gives up her jointure; and, I presume, also, in case of her joining with him in a conveyance, by means whereof her dower is barred; for it stands upon the same reason. 2 Lev., 146. (1)

When a wife is entitled to an equitable estate, the legal title of property being in a trustee, it has been a question whether the husband could or could not, for a valuable consideration, assign this equitable interest, so as to entitle the assignee to take it, without making any provision for the wife. It is determined, 4 Ves., that such assignment would not bar the equity of the wife;

(a) Cro. Jac., 288; 14, 18; Prec. in Can., 438; 2 Atk., 477; 1 id., 188; Prec. in Can., 22.

(b) 2 Atk., 420.

(c) Ambler, 14.

(1) *Brown v. Jones*, 1 Atk., 190; *Middlecome v. Marlow*, 2 id., 518; *Picquet v. Swan*, 4 Mason's Rep., 443. To support these settlements, the settler will be required to receive a fair and reasonable consideration for the thing settled in order to repel the presumption of fraud. It is sufficient to support such settlements that the wife relinquishes her own estate, or agrees to make a charge upon it for the benefit of her husband, or even if she agrees to part with a contingent interest. *Ward v. Shallett*, 2 Ves., 16. The consideration should, however, bear a reasonable proportion to the thing settled. *Lady Arundel v. Phipps*, 10 Ves., 139; *Bullard v. Briggs*, 7 Pick. Rep., 533; *Martin v. Martin*, 1 Comst. (N. Y.), 473.

and it would be strange if it should. It is difficult to conceive how the assignee of the husband should be in a better situation than the husband, who could not have the aid of chancery to recover such estate, without making a reasonable provision for the wife. To recover such an interest of the wife, the husband has no remedy at law; nor will any agreement of the wife, without the consent of her trustee, entitle the husband to receive it, discharged of her equity. The profits of such estate, during the coverture, belong to the husband; but he cannot get at the possession of it without the consent of the trustee. He must, therefore, if the trustee will not consent, apply to chancery to compel the trustee to deliver the property * into his hand. This [*180] application will always be regarded by the court, provided the husband will make such provision for the wife as the court judges equitable; but if he be unwilling to do equity, his application will be dismissed. If the estate be real, he is entitled to the rents and profits during coverture, and the court will permit him to receive such rents, &c.; and if his wife die, he is not accountable to her heirs for them. 4 Ves., 15; 2 Ves., Jr., 676.

Marriage settlements, after marriage, unattended with the preceding circumstances, have no greater validity than any voluntary conveyance; (a) that is to say, if the settler were indebted at the time of making the settlement, the same is void against creditors of every description. If he were not indebted at the time of making the settlement, such settlement is good against subsequent creditors. (1)

It will be proper to notice, in this place, the effect of those settlements which are made by a husband on his wife, providing for her separate allowance, under articles of separation. Such settlement has the effect of an absolute discharge of the husband from all debts contracted by her during the separation, in the

(a) Pre. in Can., 22; Cowp., 273; 2 Bro. in Can., 142.

(1) *Kidney v. Cronemaker*, 12 Ves., 136; *Taylor v. Jones*, 2 Atk., 600; *Miller v. Eden*, 10 Mod., 487; *Elms v. Hughes*, 3 Desaus., 158; *Read v. Livingston*, 3 John. Ch. Rep., 488; *Threewitts v. Threewitts*, 4 Desaus., 560; *Bank U. S. v. Emms et al.*, Wright's Ohio Rep., 604.

But a suitable provision, made by a husband for his wife during coverture, will be sustained in equity against him and his heirs. *Riley v. Riley*, 25 Conn., 154.

course of business and ordinary purchases; but has nothing to do with the question whether a husband could not be obliged to maintain a wife thus separated, who had become a pauper; for, in such case, the creditor became a creditor, not of choice, but in obedience to the laws of society and humanity. The doctrine above stated seems to have been fully established by a variety of authorities. Latterly, some doubts have been entertained of the correctness of this principle. It is objected that, if this be the case, it renders the wife a *femme sole*, and that she would be entitled to all the personal property that accrued to *her during [*181] coverture; but that the law is, undoubtedly, otherwise.

The authorities which established the controverted doctrine certainly went very wide of favoring the idea that such a wife was a *femme sole*. They only recognized the idea that it was equitable and legal that a husband should be bound by his contracts in the articles of separation. If the articles be that he and his wife should live separate, no right is abandoned, only the right of the person and personal services.

If he covenant that he will not meddle with the real estate, he abandons his right to the usufruct of it.

If he covenant that he will not take from her property that comes to her during the coverture; in such case he is not entitled to any legacy that may be bequeathed to her.

If he settle anything upon her, he is bound, though such settlement would be fraudulent as to creditors.

I apprehend that those decisions which foster the idea that the husband is not bound by the contracts of the wife, even for necessities, when she lives separate from him, upon articles of agreement, are correct; but not on the ground that she has a separate allowance. For I see no difference, in point of principle, betwixt the case where there is no separate allowance and where there is. I perceive no greater reason why a husband should be bound by the contracts of his wife who voluntarily and amicably absents herself from his domicile, than where she elopes from him. And, in the last case, it will not be contended that a husband is obliged to support his wife who elopes from him. (1)

(1) The doctrine of the validity of settlements, under an agreement between husband and wife to live separately, and the rights of the parties growing out of

In case of settlements upon wives of real property, as their sole and separate estate, their complete dominion over it is fully established. (a) But settlements for a separate maintenance, of [*182] real property, cannot be alienated; * and the wife is only entitled to the usufruct. A husband promises his wife that, if she will sell her lands and let him have the avails, that he will leave to her that amount. Although such executory promise is not binding upon the husband, yet, if the husband should give a bond to a third person, in trust for his wife, in performance of such promise, such is not fraudulent against creditors. (b)

A gift to the wife, as a *donatio causa mortis*, is good.

An agreement by husband and wife, previous to the marriage, is not extinguished by the marriage. (c)

According to Coke's Reports of Forse and Hembling, 4 Rep., 60, it was holden that marriage was a countermand of a will of real property made by the wife; while, in *Sill v Gould*, which appears to be the same case, it is stated that ANDERSON considered marriage by a *femme* as a countermand of her will. The other judges held, indeed, that the will was void; but it was because, at the time of its consummation, she was incapable of devising real property, by reason of the statute of Henry VIII. (1)

A settlement, made by a woman before marriage, of her estate, to her separate use, without the knowledge of her husband, will not bind him. (d) (2)

(a) Fre. in Can., 156; 3 Ves., Jr., 487.
(b) 3 Lev., 143; 1 P. Wms., 441.

(c) Ch. Ca., 118.
(d) 3 Ver., 17.

such agreements, has already been examined in Chapter VII. Any further discussion of their effect is not here deemed necessary.

But where a settlement is made on a married woman without restriction, and the profits are insufficient for her support, the wife may, under the direction of the court of chancery, dispose of a part of the principal of the estate for her necessary support. *Porter v. Baldwin*, 7 Humph., 175.

(1) See *ante*, page 253, *et seq.*

(2) It has long been held that such settlements were in derogation of his marital rights, and therefore void. *Strathmore v. Bowles*, 1 Ves., 22; *Goddard v. Snow*, 1 Russ. Rep., 855; *Howard v. Hooker*, 2 Rep. in Chan., 42; *St. George v. Wake*, 1 Myl. & K., 610; *Tucker v. Andrews*, 13 Maine Rep., 124; *Jordan v. Black*, 1 Term Rep., 142. In *Lowry v. Tierman*, 2 Har. & Gill, 34, the wife, before marriage, had

A woman may, before marriage, with the consent of her intended husband, convey all her stock in trade to trustees, to enable her to carry on a trade separately, for her own separate use; and this property cannot be taken for his debts, or the profits arising from it. The question may be asked, why is his consent necessary? She was not then *sub potestate viri*. The reason doubtless is, it would operate as a fraud upon her intended husband, and disappoint his just expectations. But if she do so openly, and with his knowledge, and he marries her, I apprehend it is sufficient evidence of his consent. 3 Term Rep., 618.

* In 2 Brown in Can., there is a case, determined by Justice BULLER, where we find it laid down that no case [*188] has established the rule that all conveyances made by a wife before marriage are void, merely because not communicated to the intended husband. And that, in a case where the woman had never married before, the doctrine by him maintained is this: If the wife, before marriage, has held out to the husband that he will be entitled to her property, her conveyance of it out of his reach will be a fraud, and the conveyance void. The husband must have been deceived: a mere concealment alone is not sufficient to avoid the conveyance. The cases here referred to must be such, where the conveyance must be for the separate benefit of the wife, or for that of some volunteer. For a conveyance by her, for a valuable consideration, could never be void in the hands of a *bona fide* purchaser. The question, in all these

transferred her whole estate, by deed, to trustees, who were to permit her to receive the profits during her life, and no power reserved over the principal, except the right of disposing by will; and the court of chancery refused, after the marriage, to modify the trust, or sustain a bill brought for that purpose by husband and wife. Such settlement is always good, if made with the knowledge and consent of the future husband, and if he is a party to the settlement a court of equity will not avoid it, although he was an infant at the time it was made. *Sloccombe v. Gubb*, 3 Bro. Rep., 545; and if no imposition is practised, or intended to be practised, on the husband, it has been held to be good without notice to him, though the propriety of this may be strongly questioned. *King v. Colton*, 2 P. Wms., 674; *Jones v. Cole*, 2 Bailey's E. C. Rep., 330.

To make an ante-nuptial settlement void for fraud as to creditors, it was held to be necessary that both parties concur in, or have notice of, the intended fraud. *Andrews v. Jones*, 10 Ala., 400.

cases, was this: Was the husband deceived and disappointed? It seems to me, such deception may often be practised by concealment, and that the doctrine in the foregoing case, to the extent laid down, is very questionable.

[*184]

*CHAPTER XIV.

OF THE HUSBAND'S TAKING MORTGAGES TO HIMSELF AND WIFE
OF A WIFE'S MORTGAGING HER LANDS TO AID HER HUSBAND.
OF THE WIFE'S PLACE OF SETTLEMENT. OF HUSBAND AND
WIFE BEING WITNESSES FOR AND AGAINST EACH OTHER.
THEIR JUSTIFYING A BATTERY, IN EACH OTHER'S DEFENCE.
HUSBAND'S DEVISING TO HIS WIFE. THE HUSBAND'S RIGHTS
AND LIABILITIES, IN CONSEQUENCE OF HAVING A WIFE EXECU-
TRIX.

THE husband lends money, and takes a mortgage to himself and wife. On his death, the mortgaged premises belong to the wife; and she is entitled to the money due. Where the *jus accrescendi* is acknowledged, no other principle need be sought for to establish the right of the wife. But even in those States where it is not acknowledged, I apprehend that the right of the wife cannot be controverted. Here, indeed, if such property is wanted to pay the debts of the husband, the right of the wife must yield to such a claim. But she will hold it against any volunteer. It is, in substance, a voluntary conveyance to the wife; a gift by the husband to the wife of the debts, provided she should survive him. For it cannot be pretended that, if the money had been paid during the coverture, that the wife could have any claim to any part of the estate. (1)

(1) By referring to the examination of the *jus accrescendi*, in a former chapter, it will be seen that, in the case of a conveyance to husband and wife, they do not thereby become joint-tenants, but are each seised of the entirety, and the survivor takes the whole. *Ross v. Garrison*, 1 Dana, 35; *Rogers v. Grider*, id., 243; and the same words of conveyance, that would make two other persons joint-tenants, will

A married woman may join with her husband in mortgaging her estate of inheritance; and, provided this is done by a fine, it is valid. In this country, the same can * be done by any ordinary mode of conveyance; and a trust estate will be [*185] equally affected with a legal estate. (1)

make husband and wife tenants of the entirety. *Doe v. Parrott*, 5 Term Rep., 652; *Jackson v. Stevens*, 16 John. Rep., 115; *Rogers v. Benson*, 5 John. Ch. Rep., 437; *Barber v. Harris*, 15 Wend., 615; *Taul v. Campbell*, 7 Yerger, 319; *Shaw v. Hearsey*, 5 Mass. Rep., 523; *Greenlaw v. Greenlaw*, 13 Maine Rep., 186; *Draper v. Jackson*, 16 Mass., 480; *Bronson v. Hall*, 16 Vt., 309.

In the foregoing cases it is held that the estate, which the husband and wife take in a conveyance to them jointly, agrees with an estate in joint-tenancy, in the right of survivorship, but differs in this, that neither has the power to convey without the concurrence of the other. See, also, *Fairchild v. Chastelleaux*, 1 Penn., 176; *Needham v. Branson*, 5 Ired., 426; *Taul v. Campbell*, *supra*; *Dickinson v. Codwise* 1 Sandf. Ch. Rep., 214; *Den v. Hardenburgh*, 5 Halst., 42. When husband and wife thus become tenants by the entirety, he cannot alien the entire estate; but it is held that he may execute a mortgage of his interest, or make a lease in his own name, or join the wife. *Jackson v. McConnell*, 19 Wend., 175.

It is said, however, that husband and wife may be made tenants-in-common by a gift to them, in *express* words, during coverture. 2 Preston on Abstracts of Title, 41; *id.* on Estates, I, 32. In Ohio, where no joint-tenancy exists, in the case of a devise to husband and wife, they take as tenants-in-common, and not as tenants of the entirety. *Sargeant v. Steinberger*, 2 Ohio Rep., 305; *Wilson v. Marsh*, 13 id., 68.

In Connecticut, the husband and wife, in such case, are held to be joint-tenants, and the husband may convey his interest. *Whittlesey v. Fuller*, 11 Conn. Rep., 337.

From the doctrine of the above authorities, except in Ohio and Connecticut, it is settled that, where a mortgage is made to husband and wife in their joint names, the interest in it goes to the wife as survivor. 2 Rand's ed. of Pow. on Mort., 685; *Draper v. Jackson*, *supra*. But such mortgages are void as to creditors. *Stileman v. Ashdown*, 2 Atk., 477, 485; *Fletcher v. Sedley*, 2 Vern., 490; *Christ's Hospital v. Bugden*, *id.*, 683. It is precisely like the case of a purchase made by a husband, in the joint names of himself and wife, who afterwards becomes a bankrupt. He must not only not be indebted at the time of the purchase, but not be in trade, to make it valid against creditors. See *Glaister v. Hower*, 8 Ves., 195; 9 id., 12; 11 id., 377.

(1) And she may create a valid power in the mortgage to sell in default of payment, may convey upon condition, and prescribe the terms. Lord THURLOW, in *Clinton v. Hooper*, 1 Ves., 186; *Demarest v. Wyncoop*, 3 John. Ch. Rep., 129; *Pybus v. Smith*, 1 Ves., 189; *Essex v. Atkins*, 14 id., 542. So where a *feme covert* in consideration that a creditor of her husband would give him further time for the payment of his debts, executed a deed jointly with her husband, in form a mortgage

When a wife has mortgaged her estate, and the mortgage-money is not paid at the day, if the husband should take up more money on the credit of the estate mortgaged by the wife, the mortgaged premises will be holden for such sum afterwards borrowed. For the legal estate was in the mortgagee, by the forfeiture occasioned by the non-payment of the first sum; and equity will not strip him of the land until the last sum borrowed is paid, as well as the first, as he had the legal title and equal equity with the wife. (a) (1)

When a wife has mortgaged her land to raise money for her husband, and he dies, his personal estate shall be liable to discharge the debt, provided there is such estate, after the debts of the husband are paid. (b)

If a wife join in the mortgage of her estate, and the husband die and make a will and give legacies, although all the creditors of the husband, of every description, shall be satisfied before the wife has any claim, yet the wife shall, after the debts are paid, have the benefit of the personal estate to redeem her land so mortgaged, although the legatees thereby lose their legacies

(a) 1 Vern., 41.

(b) 1 Vern., 487; 1 P. Wms., 367.

of real estate, to secure the payment: although the deed was not acknowledged strictly in accordance with the existing statutes, still, it being for property which she had the right to convey, it was held, in equity, to create a specific lien, and enforced accordingly. *Brundige v. Poor*, 2 Gill. & John., 1.

(1) *Powell on Mort.*, 724. But it is necessary, in order to make it liable for the money afterwards taken, that the mortgaged estate should have become forfeited before the last advance was made. The first case upon this point is that of *Reason v. Sacheverell*, reported in 1 Vern., 41, and in 2 Chan. Cas., 98. By the first report of this case, it seems that husband and wife, having occasion to raise £400, levied a fine on the wife's land, and made a mortgage of the same; and after the mortgage was forfeited the husband paid in part of the mortgage-money, and afterwards borrowed as much more of the mortgagee as he had paid in. It was decreed that the mortgagee, having the estate-at-law in him by the forfeiture of the mortgage, should hold the land against the heir of the wife, and that, if the heir would not pay in the whole, principal, interest and costs, he should be foreclosed. But by the last report of the case it appears that the husband and wife, by an indorsement upon the mortgage-deed, consented that the land should stand charged with the last advancement. If this last report of the case is the true one, it determines nothing in support of the proposition in the text. As to which is the correct report, see 1 Baithby's Vern., 41; note to page 726, Rand's ed. *Powell on Mortgages*.

through a deficiency of assets. 1 P. Wms, 264. But this right of the wife to be considered as a creditor, may be repelled by parol evidence which shows that it was her intention not to be a creditor. (a) (1)

(a) 1 P. Wms., 264; Combs., 250.

(1) The mortgage being originally the debt of the husband, his personal estate is the primary fund out of which it should be paid; and the wife, by consenting to charge her lands for its payment, does not change the husband's original liability. *Clinton v. Hooper*, 1 Ves., 186, 187; *Tate v. Austin*, 1 P. Wms., 264, cited in the text, subjected the husband's personal estate to the payment of such debt in preference to legacies which he had bequeathed to charities out of his personal estate, on the ground that the right of the wife was to be considered in the nature of a debt. In *Pawlet v. Delaval*, 2 Ves., 663, 669, Lord HARDWICK observed that there were several instances where wives had concurred to pledge part of their separate property for a debt of their husbands, and the court never said that the security should not take place, but had held it to stand as a pledge—the husband, nevertheless, bound to exonerate; and again in *Robinson v. Gee*, 1 Ves., 252, his lordship observed that it is a common case for a wife to join in a mortgage of her inheritance for a debt of the husband, and after his death she is entitled to have her real estate exonerated out of his personal and real assets, the court considering her estate only as a security for his debt, and none of his creditors have the right to stand in the place of the mortgagees, to come round on the wife's estate. *Wilkinson v. Beale*, a manuscript case before the Vice-Chancellor, 27 January, 1823, cited in *Powell on Mortgages*, 727, in note, is another leading case on this point. Husband and wife mortgaged the wife's estate, to raise money for the use of the husband. The husband covenanted to pay the money, and gave the usual bond. The proviso for redemption was on payment by the husband or his representatives. The husband died, devising some real estate, but making no will of his personal property. His widow took out letters of administration, paid the interest on the mortgage, and died, having devised the mortgaged estate to the plaintiffs. The bill, which prayed for liberty to redeem, brought the devisees of the husband before the court, asking that they should pay out of the husband's assets the principal and interest due on the mortgage, and a decree was made according to the prayer of the bill, an inquiry being directed as to the assets of the husband that came into the hands of the wife.

The money, in such case, is for the husband's use—he covenants to pay it. The estate of the wife having paid the debt, he is considered, in equity, as the debtor, and the land but as an additional security. As to the effect of such covenants of the husband in similar cases, see *Poeck v. Lee*, 2 Vern., 604; *Earl of Oxford v. Lady Rodney*, 14 Ves., 417; *Heron v. Newton*, 9 Mod., 12; and the husband cannot tie up or direct the application of his personal estate, so as to shield it from these rights of the wife. *Astley v. Tankerville*, 3 Bro. C. C., 545.

It seems, however, that if, from the nature and circumstances attending the con-

The wife joined with the husband and levied a fine of her estate, to raise £400 by mortgage of her estate, to buy a commission in the army for her husband. (a) The money was paid by the mortgagee: but before the money could be applied to the purchase of the commission, the husband died. In this case, the £400 was considered as a debt due from the estate of the husband to the wife; * and decreed to be paid to the wife [*186] out of his personal estate, if there was sufficient after all his other debts were paid. 2 Ver., 689.

A husband borrows money, and the wife joins with the husband in levying a fine, by way of mortgage to the lender, and

(a) 3 Brown in Can., 301.

tract, it can be inferred to have been the intention of the parties that the wife's estate alone should be held liable to discharge the mortgage debt — as in the instance of a mortgage having relation to the settlement of the estate by agreement of the parties upon the marriage, since the inference may be drawn that the agreement upon the marriage extended to the subsequent mortgage, and that it was stipulated that the sum to be borrowed should be charged upon and borne solely by the settled estates — such a case will exempt the husband's estate from the wife's equity. *Lewis v. Nangle*, Ambler, 50; and see *Roper on Husband and Wife*, 146. So if the money was borrowed to pay off the debt of the wife, contracted *dem sola*, the husband's assets would not be liable; and if the estate of the wife descend to her, charged with the debt of her ancestor, the rule will not apply. *Baggot v. Oughton*, 1 P. Wms., 357, said to have been affirmed in the House of Lords, but not reported; *Sugden on Powers*, 2d ed., 571; and the same doctrine holds where the land is charged with her own mortgage debt before marriage, and also where the money borrowed was applied to her separate use. *Clinton v. Hooper*, 2 Ves., 188.

As to the method of determining to whose use the mortgage-debt was contracted. If it was for the use of the husband, it is nothing more than a resulting trust in favor of the wife, which may be proved by parol. *Clinton v. Hooper*, *ut supra*; *Jackson v. Matesdorf*, 11 John. Rep., 91; 13 id., 463; *Jackson v. Morse*, 16 id., 197; *Botford v. Burr*, 2 John. Ch. Rep., 469; and this even in opposition to the deed and answer of the defendant, denying the trust. *Gillespie v. Moore*, 2 John. Ch. Rep., 601.

The proposition is laid down in the text, that the right of the wife to be considered as a creditor may be repelled by parol evidence which shows it to have been her intention not to be considered as such. This, with some limitation, is true. Parol evidence is not admissible of the wife's declaration that, in joining in the mortgage, she intended it as a gift to her husband. Lord LUTENOWICH Chancellor, in *Clinton v. Hooper*, *ut sup.* But he also held that she might bar herself by telling the executor that she did not intend to claim this right, and desiring that he would proceed in paying the legacies; and that parol evidence might be admitted of her declarations to this effect.

the husband dies; the husband's estate shall be applied to pay off the mortgage; provided there is sufficient after all his debts are paid, although the legacies in the husband's will should be defeated by the means. (a)

If a *femme sole*, for a sum loaned to her, mortgage her lands, and then marry; and the mortgagee assign the mortgage, and the husband covenant to pay the mortgage money to the assignee, and die; although the husband would have been liable in his lifetime, and his executors, after his death, to have paid the assignee the debt; yet, the surviving wife shall not have aid of the husband's personal estate, to redeem the mortgage. Yet, if the mortgage money loaned to the wife, had been paid to the husband after marriage, she should have aid of his estate. 1 P. Wms., 348.

When the husband's estate is under mortgage, if the wife mortgage her estate to disencumber his, and the husband die, the wife shall stand in the place of the mortgagee, and be satisfied from the husband's estate, before the estate shall be enjoyed by the heirs. (b)

A mortgage, though in fee, is no more than a chose in action. It is personal property, and is liable to the same disposition by the husband, as all other choses of the wife are; and, like all other choses, will be considered as purchased by him, if he make a suitable settlement upon her, in consideration of the fortune received by her. If her husband do not procure the payment of the money on the mortgage, his alienation of the mortgage will not bind the wife; for he is not considered as reducing it to possession, until payment of the money is made. (c) It may * be alienated by the husband's creditors getting possession of it for the payment of the husband's debts; and this will be considered as a reducing to possession; so that, on the husband's death, it will not survive to the wife. (1)

(b) 2 Atk., 264.

(a) 1 P. Wms.; 264. 2 Ver., 680.

(c) 2 Ver., 501—401; P. in Can., 412.

(1) In the case of a mortgage to a wife, the legal fee of the lands in mortgage continues in her, yet she is but a trustee, and the trust of the mortgage follows the property of the debt. *Boswell v. Brander*, 1 P. Wms., 874; *Bates v. Danby*, 2 Atk.,

If the husband become a bankrupt, the mortgage belongs to the assignee of the bankrupt. For the mortgage, in such case, is as effectually disposed of by the operation of law, as by the voluntary disposition of the husband. But it would be otherwise, if, by the articles previous to the marriage, it were agreed, that in the event of the husband's bankruptcy, it should remain to the wife. 1 P. Wms., 458, 461.

Whenever a woman marries, if her husband have a settlement, she obtains a settlement where her husband is settled, by the marriage, without any commorancy in the place of her husband's settlement. If her husband have no settlement, she gains none. But during the coverture, living with her husband, she cannot be sent back to her maiden settlement. But if he leave her, or die, she can be removed to her maiden settlement. For by marriage, she did not gain a settlement, nor lose her own. See Burn's Justice, §74 to §79, and the cases there cited. (1)

It has been a disputed question, whether a wife could be removed to her maiden settlement, when her husband, who had no settlement, had left her, but was living. The authorities are contradictory; but I apprehend that it is now settled, that she may be removed to her maiden settlement. The objection, that you could not separate husband and wife, does not hold; for they were already separated. (2)

208; and if the husband survive the wife, the heir of the wife, who has the legal estate, is the trustee for the husband. *Turner v. Crane*, 1 Vern., 170; *Pow. on Mort.*, 683. It has been questioned whether in this respect, there is not a distinction between a mortgage in fee and for a term of years. 1 Scho. and Lef., 176; 1 Roper on Husband and Wife, 226. A husband may release a mortgage given to his wife, for the payment of money. *Marshall v. Lewis*, 4 Litt., 141.

(1) The doctrine, that if the husband has a settlement it becomes the settlement of the wife, immediately upon the marriage, seems to be well established. *Danby v. Newhaven*, 5 Conn. Rep., 584; *Inh. of Dalton v. Inh. of Barnardston*, 9 Mass. Rep., 201; *Overseers of Canajoharie v. Overseers of Johnstown*, 17 John. Rep., 41; *Mount Holly v. Andover*, 11 Vt. Rep., 226.

(2) It is well established in Vermont that she may. *Bethel v. Tunbridge*, 13 Vt. Rep., 446; *Royalton v. West Fairlee*, 11 Vt. Rep., 433; *Bradford v. Lunenburg*, 4 Vt. Rep., 481. See, also, *Dedham v. Natick*, 16 Mass. Rep., 186; and *Orange v. Smithfield*, 6 Cow. Rep., 760. When the husband is living within the State, and

A marriage, although not celebrated by the legal officer, was, before the statute of 26 George II, always holden to be a sufficient marriage to gain a settlement. But since that statute declares, that marriages celebrated * in any manner different from what that statute directs, are void to all intents [*188] and purposes; a marriage, celebrated not conformable to the requisites of that statute, is not sufficient to gain a settlement for the wife. It has been held, however, that a long cohabitation together as man and wife is sufficient evidence of their being married, as the law directs. (1)

It is a general rule, that when a settlement is procured for any person by fraud, that such settlement shall not be good. But when a marriage is procured by fraud, the settlement of the wife is, notwithstanding this, good. (a)

I apprehend that it has been the general received opinion in

(a) 3 Mod. 221.

able to maintain the wife, she can only be removed to the husband's last place of settlement. *Sherburne v. Norwich*, 16 John. Rep., 186.

A married woman, whose husband has no settlement of his own, will not take a settlement from her mother, acquired after her marriage. *Andover v. Merrimack county*, 37 N. H., 438.

Though the wife retains her maiden settlement, and the children take that of the mother, when the husband and father has none in the state, yet so long as he cohabits with his wife and maintains a family establishment, his wife and children cannot be removed from him. *Rupert v. Windhall*, 29 Vt., 245; *Hartland v. Windsor*, 29 Vt., 354.

(1) Whether the settlement of the wife will follow that of the husband, depends entirely on the validity of the marriage. A void marriage will not communicate the settlement of the wife to the husband. *Middleborough v. Rochester*, 12 Mass. Rep., 363; *Medway v. Needham*, 14 Mass. Rep., 157; *West Cambridge v. Lexington*, 18 Mass. Rep., 566; *Mount Holly v. Andover*, 11 Vt. Rep., 226; *Manchester v. Springfield*, 13 Vt. Rep., 225. But the husband and wife are competent witnesses to prove the validity of the marriage. *Raynham v. Canton*, 3 Pick. Rep., 293; and a marriage celebrated by a justice of the peace, without the consent of parties, is of no validity to change the place of settlement of the wife. *Mount Holly v. Andover*, 11 Vt. Rep., 226. In Connecticut the settlement of a female married to a foreigner, having no settlement within the State, is not affected by such marriage. *Lebanon v. Hebron*, 5 Conn. Rep., 584. Where the wife is a free woman, and the husband a slave, the children of the marriage have their settlement in the town where the mother had her last legal one, without regard to the slave husband. *Martleton v. Kingston*, 20 John. Rep., 1. So a female slave married to a freeman gains no new settlement by the marriage, for she remains under the control of the owner. *Dighton v. Freetown*, 4 Mass. Rep., 529.

Connecticut, that the wife of a person who has no settlement may gain a settlement by commorancy, under our statute.

It is a rule of law, that a husband and wife cannot be witnesses for or against each other. (a) This is peculiar to the relation of husband and wife. For parents are witnesses for and against their children, and children are witnesses for and against their parents. The principle of this rule, arises from that anxious solicitude which the law discovers, to preserve domestic tranquillity. It cannot be supported upon the ground of interest in the suit; for the wife has no property that can be affected by the suit. She is not, then, interested in it. It is highly probable, that she is anxious respecting the event of the suit. So a father is anxious in the case of a child: but the interest which excludes, must be a direct pecuniary interest. (1)

(a) 4 T. R., 673.

(1) The competency of husband and wife, as witnesses, for or against each other, seems not to have been very thoroughly considered in the text. The general principles, so far as they are laid down, are correctly stated, but a vast number of authorities in existence at the time when it was written, seems to have been either overlooked, or intentionally omitted. The editor may be pardoned for attempting to supply this omission, so far as lies in his power. The general rule is that they cannot be witnesses for or against each other, either in civil or criminal proceedings.

It has been resolved by the justices, says Lord Coke, 1 Co. Litt., 6 b, that a wife cannot be produced, either for or against her husband. *Quia sunt duas animae in carne una*; and it might be a cause of implacable discord and animosity, and a means of great inconvenience. In a prosecution for bigamy, the first husband will not be admitted to prove the marriage against the wife. *Mary Grigg's case*, Sir T. Raym., 1. And the husband is not a competent witness against the wife, in a prosecution against her and others, for a conspiracy in procuring a marriage between her and himself; *Rex. v. Sergeant et al.*, 1 Ry. and Moo., 352; nor can a wife be a witness against her husband, for a prosecution for murder, even with consent of parties *Randall's case*, 5 Cit. Hall, Recorder, 141, 153, 154.

In the case of the *King v. Inhabitants of Cliviger*, 2 Term Rep., 268, the rule was established by ASHURST and GROSE, justices, that from principle of public policy, the husband and wife would not be permitted to give evidence that might even tend to criminate each other. Justice GROSE, in delivering his opinion, observes, that the general rule as to husband and wife is founded, not on the ground of interest, but of policy, by which it is established, that a wife shall not be called to give testimony tending in any degree to criminate her husband, and that Lord HALKE had said, that she should not be called indirectly to criminate him, and that this rule had governed all the decisions from Lord HALKE's time to the present. If this doctrine

In ordinary cases, any person may be a witness in his own cause, or in one in which he is interested, if the opposite party

be true, the competency of the wife to testify is measured by that of the husband, and she is excluded upon the general principle, that the husband is not bound to criminate himself. There is an unreported case decided in New York, before Radcliffe, Mayor, cited in Cowen and Hill's Notes to Phil. on Ev., vol. 1, page 147 which seems strongly to favor the doctrine of the *King v. Inh. of Cliviger*.

But it is believed that in the last case, the court overrated the strength of the authorities cited to support it. The authority of Lord HALK goes no further than this,—that a woman is not bound to swear, or to give evidence against another, in a case of theft, &c., if her husband is concerned, though it be material against another, and not directly against the husband; and it only shows that a woman cannot be compelled, but not that she may not be sworn if she is willing.

This doctrine has since been strongly doubted, and was directly questioned in the case of *Rex v. Inhabitants of All Saints*, in Worcester, a manuscript case, decided in Easter term, 1817, and in *Rex v. Inhabitants of Bathwick*, 2 Barn. and Adol., 639. And the weight of authority and principle may be considered as settled, to the point that the husband and wife may be called to contradict or criminate each other in a collateral matter, and in all cases where they are not called to contradict or criminate each other as a party to some cause.

Nor can they be witnesses for each other, as a general rule, either in civil or criminal proceedings. *City Bank v. Bangs*, 3 Paige, 36; *Fitch v. Hill*, 11 Mass. R., 286. The reason assigned why they may not be witnesses against each other, does not seem to be applicable in this instance, for it can hardly be said, that permitting them to testify in each other's favor, would be productive of domestic discord, or at all disturb the tranquillity of the marital relations. Nor would they be excluded on the ground of interest.

But notwithstanding this, there seems to be sufficient reasons for the rule. Some general principle of their competency must be established, and in order to prevent them from testifying against each other, they must be excluded altogether. The wife certainly could not be introduced to testify to facts making in favor of her husband, at the same time withholding those which might operate against him, upon the well established principle of evidence, that when a witness is called to prove one fact in a case, he may be cross-examined as to all others within his knowledge, save those which may tend to criminate him. Therefore, on a prosecution for larceny or murder, the one is not a competent witness for the other, and in the case of a conspiracy or prosecution against several persons, the wife of one was not permitted to testify for the others, a joint offense being charged, and an acquittal of all the other defendants being a ground of discharge for the husband. *Rex v. Locker et al.* 5 Rep., N. P. C., 107; 1 Ryan and Moo., 354; *Rex v. Frederick*, 2 Strange, 1094, and see, also, *Commonwealth v. Eastland*, 1 Mass. Rep., 15; *The People v. Bill*, 10 John., 95; *People v. Colbern*, 1 Wheel. Cr. Cas., 479.

Two persons were jointly indicted for murder; one as principal, and the other as aiding and abetting. They were separately tried. The wife of the second was offered as a witness for the first, and held competent. *Workmen v. State*, 4 Sneed,

consents to it; (a) but, in the case of husband and wife, if the husband, wife, and their antagonist all agree, that the wife may be

(a) *Hardw., 222.*

(Tenn.), 425. And in *Haskins v. People*, 16 N. Y. (2 Smith), 344, it was held that the testimony of the wife of an accomplice may be taken into consideration in determining the credibility of the testimony of the husband. On the trial of a man on an indictment for adultery, the husband of the woman, with whom the adultery is alleged to have been committed, is not a competent witness to prove the adultery. *State v. Welch*, 26 Maine, 30. Held, in *People v. Carpenter*, 9 Barb., 580, that the testimony of the wife would never be received against her husband, except in proceedings instituted against him by herself.

The wife of an assignor of a chose in action, is a competent witness for the assignee in an action to recover such chose. *Prince v. Down*, 2 E. D. Smith, 525. In an action for assault and battery on the wife, brought in the name of the husband and wife, the defendant cannot call upon the wife to testify, under the New York statute of 1847, or sec. 344 of the Code of Procedure, which authorizes one party to call upon the other to testify. *Pillow v. Bushnell*, 5 Barb., 156. Held, in *Marsh v. Potter*, 30 Barb., 506, that under the Code of New York, the husband and wife are competent witnesses in their own behalf, and for each other, when co-plaintiffs or co-defendants. (ROSEKRANS, dissenting.) And, in the case of *Babbott v. Thomas*, 31 Barb., 277, it was held, that, in an action brought by a husband and wife to cancel a bond and mortgage, executed by them, and to restrain foreclosure, the husband was a competent witness, on his own behalf, to prove usury in the consideration, notwithstanding the wife's interest in the event of the suit, by reason of her inchoate right of dower in the mortgaged premises.

Where the estate of a deceased person is interested in the result of a suit, his widow, if she have no interest in the estate, is a competent witness, unless the facts, to which she testifies, came to her knowledge through *confidential communications* from her husband. *Jackson v. Barron*, 37 N. H., 494; *Smith v. Potter*, 21 Vt., 304; *Coffin v. Jones*, 13 Pick., 445; *Radcliff v. Wales*, 1 Hill, 63; *Barnes v. Comack*, 1 Barb., 392; *Stober v. McCarter*, 4 Ohio (N. S.), 513; *Garkill v. King*, 12 Ired., 211.

The husband or wife is not a competent witness where either the legal or equitable interest of the other is involved in the issue. *Footman v. Pendergras*, 2 Strobhart Eq., 317. A wife who keeps her husband's accounts is a competent witness as to entries. *Littlefield v. Rice*, 10 Metc., 287.

The declarations of either, also, are not generally evidence against the other. Therefore, where an action is brought by or against the husband, or by husband and wife jointly in the right of the wife, the declarations of the wife are not evidence for or against the husband. *Winsmore v. Greenbank*, Willes' Rep., 577; *Albun v. Pritchett*, 6 Term Rep., 680; *Barron v. Grillard*, 3 Vesey and Beames, 165; *Baker v. Merley*, Bull. N. P., 28; *Lay Grae v. Peterson*, 2 Sand. S. C. R., 388; *Lasselle v. Brown*, 8 Blkf., 150. Nor can the wife's confession of a trespass committed by her be given in evidence against the husband, in an action against husband and wife.

a witness, the law interferes,* and prevents it. This shows that it is not because the wife is interested, that she is prevented from being a witness; for the right of the opposite party to object to an interested witness, may be waived: But to suffer such waiver, in the case of a husband and wife, has a tendency to disturb that domestic tranquillity, which is so desirable; and, therefore, the law forbids it. (1)

A wife cannot be allowed to bastardize her issue, by proving the non-access of her husband, not only upon the principle of preserving domestic tranquillity betwixt husband and wife; but, also, upon the ground, that the children of the marriage would be affected by it: so that she could not be admitted, although

Denn v. White, 7 Term Rep., 108; *Halton*, 2 Nott and McCord, 374, S. P. Nor are the declarations of the wife in the absence of her husband evidence against him, though she be a party to the suit, which is brought to recover land in which she is jointly interested in her own right. *Moody v. Fulmer*, Whart. Big., 2 Edit., 308, Pl., 439; *Turner v. Cove*, 5 Conn. Rep., 93. See, also, *Macondray v. Wardle*, 26 Barb., 612.

But where the husband is a party for conformity merely, then upon a complaint properly framed, a married woman may be compelled to disclose every matter as to her separate estate, which could be properly inquired of, if she were a *feme sola*. *Draper v. Hensington*, 16 How., 281. Nor is the wife's admission, made during coverture, of a debt due from her *dem sola* admissible as evidence against the husband. *Ross v. Winners*, 1 Halstead's Rep., 366.

But her acts and admissions as his agent are admissible. *Biley v. Suydam*, 4 Barb., 222. Admissions made by the wife are not competent testimony in a suit against husband and wife to reach property standing in her name. *Macondray v. Wardle*, 26 Barb., 612. And in an action for damages from the bite of a dog, the declarations of the defendant's wife are inadmissible as evidence against the husband. *Logue v. Link*, 4 E. D. Smith (N. Y.), 63. In an action by the husband for services rendered by himself, and also for those rendered by his wife, the declarations of his wife, during service as to the terms of her employment, were held admissible on the part of the defendant. *Hackman v. Fory*, 16 Penn., 196.

But conversations between them stand upon the same footing as other conversations, and may be given in evidence against the husband. See *Hodgkinson v. Fletcher*, 4 Camp. N. P. Rep., 70; *Scholy v. Goodman*, 1 Bing., 349.

(1) In *Barker v. Dixie*, Rep. temp. Hard., Lord HARDWICKE said that "the rule was for the peace of families, and consent should never be encouraged;" and Mr. J. VAN NESS, on the trial of a husband for murder, at the oyer and terminer in the city of New York, refused to allow the wife to testify against him, with such consent of parties. *Randall's case*, 5 Cit. H. Recorder, 149, *et seq.*

her husband was dead. (1) That the rule, that husband and wife cannot be witnesses for or against each other, does not depend

In the following cases it was held, that a married woman might testify in a case in which her husband was interested, if she did not disclose his confidential communications. *Smith v. Potter*, 1 *Williams* (Vt.), 304; *Stein v. Weidham*, 20 *Ma.*, 17; *Jackson v. Barron*, 37 *N. H.*, 494; *Gray v. Cole*, 5 *Harring.* (Del.), 418.

The wife cannot be examined as a witness against her husband, when both are sued for labor and materials furnished her. *Main v. Stephens*, 4 *K. D. Smith* (N. Y.), 86. And presumptive proof of marriage renders the wife an incompetent witness against the husband, to disprove the marriage. *Schergf v. Szadecsky*, 4 *K. D. Smith* (N. Y.), 110. In an action against an administrator, his wife is not a competent witness for him. *Malam v. Ammon*, 1 *Grant's cases* (Penn.), 123. The oath of a married woman will not sustain a warrant for the arrest of her husband for adultery, nor can a husband be a witness in a case against his wife for adultery. *Commonwealth v. Jailer*, 1 *Grant's cases* (Penn.), 218. And, in *Keaton v. McGuire*, 24 *Geo.*, 217, it was held, that the testimony of a wife, the only tendency of which is to discredit her husband, is not admissible.

(1) See marginal page 191, where Lord *HARDWICK* is cited, *contra*. The later cases seem in effect to have adopted the decision of Lord *HARDWICK*, in contradiction of the text, as sound law. Necessity was assumed as the ground of that decision. Lord *ELLENBOROUGH*, in the case of *Rex v. Luffe*, 8 *East.*, 285, observed that by a parity of reasoning, it would seem that if she was admitted as a witness of necessity, it might be competent for her to prove that the adulterer alone, had had that sort of intercourse with her, by which a child might be produced, within the limits of time which nature allows for parturition. Upon the trial of an indictment for bastardy and fornication with a married woman, she was held competent to prove the criminal conversation. *Commonwealth v. Wentz*, 1 *Ashm. Rep.*, 269. In *Sisco v. Harmon*, 9 *Vt. Rep.*, 129, it was held that the coverture of the prosecutrix for bastardy, under the sanction of the overseer of the poor, was no valid objection to the prosecution, where the child was born before the marriage of the mother.

But all these cases proceed *ex necessitate rei*. She is not competent to prove any other fact, as want of access, which other witnesses may be reasonably supposed capable of proving. *Commonwealth v. Miller*, 1 *Brown's App.*, lii; *Commonwealth v. Stucker*, 1 *ibid.*, lvii; *Commonwealth v. Shepherd*, 6 *Binn.*, 283; *Rex v. McLane*, cited 6 *Binn.*, 290. Nor can she be a witness to prove the non-access, even though her husband be dead at the time of her examination. *Rex v. Rooke*, 1 *Wils.*, 340; *Rex v. Kea*, 11 *East.*, 132. But if the court permit her to be asked a question from the answer to which a want of access may be inferred, as "how long it was since she had last seen her husband," and afterwards direct the jury, that they are not to consider anything which fell from her as evidence of non-access, and there is strong evidence of non-access from other witnesses, the verdict will not be disturbed. *Commonwealth v. Shepherd*, 6 *Binney's Rep.*, 233. But the mother of a child born in lawful wedlock, but begotten before, is incompetent to prove that the

upon the principle that they are interested, appears from this; that a husband cannot be a witness for his wife, respecting her separate property. 1 Bur., 428. To this general rule there are exceptions: In case of a charge of treason against husband or wife, they are witnesses. In cases so important to community, it is supposed that the consideration of domestic quiet, ought to yield to the public good. (1) So, too, the law has provided, that, upon an application for a power to compel the husband to find sureties for good behavior, she is a witness to swear that she is afraid of her life, or some great bodily harm; and the same proceeding may be had by the husband against the wife. (2)

When a husband is prosecuted by a public officer, for abusing and beating his wife, the wife may be a witness, on the part of the public, against her husband. I am aware that this doctrine has been reprobated by some very eminent lawyers; but we find, that in Lord Audley's case, where the transaction was the most disgraceful that ever stained the page of history, his wife was admitted as a witness to prove his abuse to her person. (a) I know it * has been said, that the court, in that case, bent the law, that punishment might reach such atrocity. How- [*190] ever, it may be, that the authority of that case may have been shaken by the *dicta* and *obiter* opinions of learned men. I find no case, by which it is overthrown; and we find this rule laid down in *Strange*, in *Rex v. Azir's* case, as an indisputable rule, and in the most unquestionable manner.

In 1 Vesey, 49, the Chancellor says, that a wife can never be a witness against her husband, except in a case for security of

(a) *Hutton*, 16.

child was not begotten by the man who became her husband before the birth of the child, in absence of other evidence of non-access. *Dennison v. Page*, 29 Penn., 420; *People v. Overseers of Ontario*, 15 Barb., 286; *Ratcliff v. Wales*, 1 Hill, 63.

(1) There are decisions on this point, in the affirmative and negative, *Dictum* in *Griggs' case*, Sir T. Raym., 1, cited by several of the later writers; *e contra*, *Brownlow*, 47; and a writer of high authority says, that in his researches he has found no case of a trial for high treason in which the wife was examined as a witness against her husband. *McNally's Ev.*, 181.

(2) *Buller's Nisi Prius*, 287; *Lord Vane's case*, 2 *Strange*, 1202; 13 *East*, 171, note a; *Rex v. Doherty*, *ibid.*, S. P.; *Mary Mead's case*, 1 *Burr.*, 543.

the peace, to prevent personal abuse to her, which he says is *ex necessitate rei*. Lord Audley's case, and, afterwards, *Rex v. Azir*, reported in *Strange*, are authorities to prove, that the wife is a witness, to support an indictment against the husband, for violence to the person of the wife. The reason arising from the necessity of the thing, appears to me to be as strong in such a case, as in a complaint for security of the peace. There is a case in *Term Reports*, which seems to me to have carried to a very questionable length the doctrine of preventing the wife from testifying in a case where uneasiness may be excited in the husband, by reason of her testimony being opposite to his. Until I saw that case, I always supposed that the rule was confined to cases where the husband was party to the suit or prosecution. The doctrine of that case seems to be, that the wife shall, in no case, give evidence tending to criminate her husband. The consequence of this doctrine, is this: When a plaintiff improves the husband as a witness, respecting a transaction to which the wife was, also, a witness; if she should happen to conceive of it in a very different point of light from her husband, and one which was favorable to the defendant; yet the defendant cannot have the benefit of her testimony, lest the wife should seem to impeach the correctness of her husband.

* A wife is a witness to prove her child a bastard. Hard-
[*191]wicke, 77.

A wife cannot be a witness for, or against, her husband, although all parties consent.

Although it has been frequently said by judges, that the determination in Lord Audley's case, that his wife was a good witness, on an information against him for personal abuse, was not law, yet I am not able to find a single decision in point, against that opinion: for, in the cases where this has been said, they were not cases of personal tort to the wife. The doctrine in Lord Audley's case has been confirmed by *Rex v. Azir*, in *Strange*; and in Lady Louber's case, her affidavit was read to lay a foundation for an information against her husband, for personal violence by him to her. (1)

(1) It is not a matter of much practical importance to the lawyer how, or why, that has come to be law, which he finds most undeniably to exist as such; and is

It is mentioned, as an exception to the general rule, that husband and wife cannot be witnesses for, or against, each other, that when there has been a forcible marriage, and the husband has been indicted for the offense, that the wife is a witness: But this is not an exception; for such marriage is void, being obtained by duress; and the supposed wife was not a wife, either *de jure* or *de facto*. It is because, in point of law, she is not considered a wife, that she is admitted to be a witness. (1)

this point of view, it is important that the doctrine of the text should be treasured up, for it springs from none of those fountains of *reason* which give birth to nearly all the principles of the law of husband and wife.

Lord Audley's case and *Rex v. Azir*, have been cited by every writer upon this subject, from the time of their decision, in support of the principle of the text. With regard to the first, the general principle upon which the trial was conducted can hardly be considered as sound law, though its result was one dictated by every principle of law and justice. The actor in a scene at which every principle of morality and justice revolts, could hardly claim to be tried by the principles of that law which he had so foully outraged; and had he claimed it, the peers who sat in judgment upon him were not over scrupulous how they came to the just determination to which they finally arrived. In this case necessity afforded no plea or excuse for the admission of the wife as a witness, for the very principal in the transaction was himself called as a witness for the prosecution, and conclusively proved the guilt of his master. But she was admitted, and hence the infraction of the general rule, which has since been considered as good law, and perhaps justly.

The case of *Rex v. Azir*, also, reported in *Strange*, cannot be considered, from that report, as of high authority. It is reported in scarce three lines, deciding the mere naked principle, but we are not told how the case arose, or any of its circumstances.

In *Grigg's case*, *Sir T. Raym.*, 1, and in *Gilb. Ev.*, 120, the principle is doubted, but the latter authorities have placed it beyond question. In *Rex v. Sergeant et al.*, *Ryan & Moody*, 354, Lord ABBOT directly affirms the decision in *Audley's case*, and *Rex v. Azir*, and also says the same principle was held in *Rex v. Perry*, a case of abduction, tried before Ch. J. GIBBS, when recorder of Bristol. The same doctrine is also said to have been held in *Soule's case*, 5 *Greenl. Rep.*, 407. See *Cowan & Hill's notes to Phil. Ev.*, part I, page 152. This is believed to be the acknowledged doctrine in Vermont, though no cases bearing directly upon the point have been reported.

The testimony of the wife held, never admissible against her husband, except in proceedings instituted against her by herself. *People v. Carpenter*, 9 *Barb.*, 580.

(1) *Gilb. Ev.*, 254; *Rex v. Pulwood*, *Cro. Car.*, 482, 489; *Rex v. Brown*, 1 *Hale*, 301; *Sevensden's case*, 5 *St. Trials*, 465; *Ramsey's case*, cited *Rep.*, temp *Hard.*, 83; and the respondent cannot take advantage of his own wrong; 1 *Bl. Com.*, 444. Therefore, on an indictment for a conspiracy in inveigling a young girl, in a state of

A husband may justify a battery, in defense of his wife; and a wife may do the same, in defense of her husband. We are not to understand by this, that if B, the wife of A, should be guilty of an assault upon C, and C, in his own defense, should assault B, that A, the husband, would be justified with his wife in beating C. Nothing more is to be understood by the rule than that a husband will be justified in committing such assaults and battery, as the wife would be justified in committing. As if C had assaulted and beat B; and she, in her own defense, [*192] was assaulting and beating C; which she would * have a good right to do. The husband would have a good right to do the same; and might beat C to the same extent that B, the wife might beat him; which a stranger could not do. A stranger might, indeed, use such force, as would put an end to the beating; but could not legally espouse the cause of either. The principle is this: the husband may do all that the wife may do, in such case. So, where an attempt is made forcibly to ravish a woman, she may kill the ravisher, in defense of her chastity: so may her husband: and it is justifiable homicide. (1)

Where a man finds another in the act of adultery with his wife, which is the greatest possible injury, yet the husband is not justified if he kill him; for, in this case, the wife would not be justified; and no man, in a well regulated community, can be suffered to avenge his own wrongs. (2)

Intoxication, from her mother's house, and procuring the marriage ceremony to be recited between her and one of the defendants, the girl is a competent witness to prove the facts. *Republia v. Hevice*, 2 Yeates, 114. It is also said, that the woman is a competent witness to prove the innocence of the respondent. *Rex v. Perry*, Bristol Assizes, 1794, Hawk. P. C., b. 1, ch. 40, § 13; and see this case mentioned by ABBOT, Ch. J., in *Rex v. Sergeant*, 1 Ryan & Moo., 354. But where such forcible abduction and marriage has been followed up by a voluntary cohabitation, the woman is not competent either for or against the prisoner. *Rex v. Brown*, 1 Hale, 301; 1 Vent., 243; 3 Keb., 193. Neither would she be a competent witness unless the force was continuing at the time of the marriage. *Cro. Car.*, 488; 1 Vent., 343; 4 Mod., 8; 1 Strange, 633; 2 Hawk. P. C., 46.

(1) 1 Russell on Crimes, 549; 1 Hale, 484; *State v. Rutherford*, 1 Hawks N. C. Rep., 457.

(2) But he is only guilty of manslaughter, and that in the lowest degree. *Manning's case*, Sir T. Raym., 1; 1 Vent., 158. In the latter case the court directed the

It has been always admitted, that a husband's devise to his wife would be good; but it has been holden by some lawyers, that a *donatio causa mortis*, by husband to wife, is void; but it is now settled, that a *donatio causa mortis*, by him to her, is effectual. It is difficult to conceive why such a question was ever made; for such a gift is in nature of a legacy, not to operate until after the death of the donor. (1)

burning in the hand to be inflicted gently, because there could not be a greater provocation, and it was such as the law reasonably concludes could not be borne in the first transports of passion. Russ. on Cri., vol. I., p. 487. But if a man find another in the act of adultery with his wife, and he kill him deliberately, and upon revenge, and after sufficient cooling time, it would undoubtedly be murder. 1 Russ. on Crime, 442; 1 East's P. C., c. 5, § 20, p. 235, and § 30, p. 251.

(1) The relation of husband and wife does not vary the application of any of the principles pertaining to a *donatio causa mortis*. The subject has been examined, uniformly irrespective of this relation, and the principles established in those cases where it did not, have been relied upon as of equal authority with those where such relation did exist between the parties to the gift. A brief notice of some of the requisites to such gift, which appear to be recognized and acknowledged by the late cases, in the case of personal property and choses in action, will not, therefore, be inapplicable, though taken indiscriminately.

In a late case of *Harris v. Clark*, 3 Comstock, 93, the facts were these: Sidney Smith, in his last illness, made his draft upon a third party, R. Clark & Co., directing them to pay to Nancy Harris or order, thirty thousand dollars, and sent the same by letter of same date. Nancy Harris was plaintiff's wife, who brought the action in his own name alone. The draft was duly received, and the defendants held funds in their own hands, belonging to the drawer, more than sufficient to pay the sum. The draft was not accepted, and the Court held that, on that account, the gift was incomplete. Had the draft been accepted, it would have operated from the time of Smith's death, as an assignment to Mrs. Harris of so much money in the hands of Clark & Co.; and it would have afforded to the plaintiff a remedy against that firm. The court adopt the principle laid down in *Mandeville v. Welch*, 5 Wheat, 286, "that a bill of exchange does not, of itself, give to the holder, either in law or in equity, a lien upon the funds of the creditor in the hands of the debtor, until after acceptance by the latter," and therefore, was not a delivery of the means of obtaining the money. By thus giving to the donor's draft, the effect only of a promise from the donor, the Court bring the case within the considerations affecting the validity of a gift of the donor's own note; and, upon that ground, decide the same to be invalid.

This case overrules the case of *Wright v. Wright*, 1 Cow., 598. In that case, the testator made a note, in consideration of love and affection, to his brother, the plaintiff, and delivered it. This was done during his last sickness as a *donatio causa mortis*, and the plaintiff had a verdict. An application to the Court upon the dis-

Where A marries a woman who is executrix or administratrix, he seems to have the same powers to administer as if he was

covery of evidence that the note was a *donatio causa mortis*, in order to move for a new trial, was refused. An appeal was taken therefrom, and ultimately the motion was denied upon that ground, the Court distinguishing the case from that of *Fisk v. Cox*, 18 Johns., 145 [cited by defendant's counsel], in that particular respect. The latter not only overrules the former in terms, but the Court review the former case, and expressly overrule it.

With respect to the operation of an unaccepted draft upon a third person, who has funds of the donor in his possession, in the hands of the donee, the Court were divided, a majority establishing the doctrine that, such draft did not operate as an assignment to the donee of the sum mentioned in the draft.

The Court decide the case expressly upon the weight of authority, *EUGLES, J.*, commencing an elaborate review of the cases presented by counsel, with the following language: "Independent of authority, my own judgment would have led me to the conclusion which the Supreme Court, in that case (*Wright v. Wright*.) adopted. In natural justice, I see no reason why he who freely and deliberately makes his note or bond to another, for the payment of a sum of money for a voluntary gift, should not be compelled to perform his engagement; for, although the giver, in such case, receives nothing in return for what he agrees to give, the breach of his promise may, by creating unfounded expectations, cause an injury to the donee, which never would have happened if the promise had not been made. But, upon a careful examination of the previous and subsequent cases, I am satisfied that, a voluntary promissory note, without consideration, is not, as the law now stands, the subject of a valid gift by the maker, either as a present donation, or as a gift to take effect at the death of the donor." This case is sustained by *Smith v. Kittridge*, 21 Vt., 248, in the case of the donor's own note in the following words: "Value received, I promise to pay Jacob Smith, Jr., and Cephas Smith, or their order, six thousand dollars, to be paid out of my estate after my decease." *Holly v. Adams*, admr., 16 Vt., 206; *Cobb v. Sawyer*, 6 N. H., 386; *Craig et al. exr., v. Craig et al.*, 3 Barb. Ch., reviews at great length all the cases upon the subject, referring to and overruling the case of *Wright v. Wright*. This doctrine has been held in England, in the case of *Holliday v. Atkinson*. 5 B. & C., 501.

The doctrine that, the promissory note of a third person may be the subject of a gift *causa mortis*, though formerly the cases were conflicting, appears to be settled by the modern authorities. It is referred to and treated as established, in the cases of *Harris v. Clark*; *Holley v. Adams*, 16 Vt., 206; and again in *Smith et al. v. Kittredge*, 20 Vt., 242, where his Hon. *POLAND, J.*, says: "Although it was formerly doubted, whether the note of a third person could properly be the subject of such gift, and many conflicting opinions are to be found upon that point, the current of modern authorities is, without doubt, in favor of the doctrine that, a note of a third person may be transferred in this way."

The gift may be direct from husband to wife. 2 Kent's Com., 7th ed., 556; *Miller*

executor in his own right; (a) for we find it laid down, in Off. Ex., 295-297, that administration by the husband, in such case, binds the wife, and that without her consent. So, too, a gift or release, by him alone, is good. (b) So, too, it was held by the court, that a man, possessed of a term for years, in right of his wife as executrix, had power to convey the same. (1)

(c) Godw., 110.

(d) 3 Wils., 277; 3 Bl., 601.

v. Miller, 3 P. Wms., 441. Such was the civil law, Cooper's Justinian, 102, 103 with reference to gifts *causa mortis* and gifts *inter vivos*.

With respect to the extent to which such gifts of personal property will be permitted, the following extract from the very able note of REDFIELD, J., appended to the case of Meach v. Meach, 24 Vt., 600, presents a clear and comprehensive view of the present state of the law, as it respects its interference with the statute of wills, and the extent to which the Courts have deemed it advisable, and within their power to go, to control such interference.

The learned judge remarks that, though as far back as the times of Justinian, efforts were made to limit the operation of such gifts, having been required to be made in the presence of five witnesses, and not to amount to the disposition of more than three-fourths of the donor's estate, if to the prejudice of the heirs; yet that, it still "maintains its hold upon the jurisprudence of most of the European States, and is evidently a good deal extending its operations in the American States."

And with respect to the statute of wills, "one cannot but feel that it was never properly intended to apply to a general disposition of a large estate, to the utter subversion of the statute of wills; and still, when we attempt to limit its operation, we encounter embarrassments not readily disposed of." Reference is made to the case of Moore v. Darton, 7 Eng. Law & Eq. R., 134, where the Vice-Chancellor, apparently without hesitation, sustained the remission of a debt of £500, made by simply giving a receipt for the debt to a third person (a servant attending the death-bed) expressing, in brief terms, the desire that, the debt should be canceled, to show that, it has not been limited to small or trifling amounts.

It would appear further, that, no cases are to be found, except a case in Pennsylvania, "where any attempt has been made to limit its operation, on account of the comparative or absolute extent of the property disposed of." To establish a principle of limitation, which shall be applicable to all cases, appears to the learned judge, to be a work of insuperable difficulty.

Where A, a few days before his death, and in his last sickness, deeded to his sister a farm on which she and her husband had resided for some years previous, and still resided, and at the same time told her, that there was personal property on the farm, naming some of it, that would be of no use to him, but might be to her, and that he would give it to her, the farm and personal property then being 14 or 15 miles distant, it was held, that this was not a valid gift *causa mortis*. Huntington v. Gilmore, 14 Barb., 248.

(1) If a married woman be executrix or administratrix, the husband has a joint interest with her in the effects of the deceased, such as devolves the administration

[*193] * In Wentworth's Office of Executors, 200, it is said that, when the wife has debts due to her, she cannot, by making an executor, deprive her husband of the benefit that might accrue to him by being administrator. But it is otherwise of goods which she holds as executrix; for no benefit could accrue to him in that case, for they go to the next of kin of the wife's testator. It seems to me that the soundness of this doctrine, as expressed in the first clause, is very questionable; for the husband's right, secured by the statute, is no other than the right of a statute residuary legatee, after debts are paid. If there be no will, it certainly is not a marital right at common law.

If the wife, before marriage, commits a *devastavit*, the husband, during the coverture, is liable. (a) If the *devastavit* were committed after marriage by husband and wife, it would be natural to suppose that the husband would be liable, after the death of the wife; but we are taught that he would not, unless judgment had been obtained against both, during the coverture (b)

Where a recovery is by husband and wife, in right of his wife as executrix, and the wife dies, nothing survives to the husband, for the judgment belongs to the administrator, *de bonis non*, of her testator. (1)

(a) Cro. Car., 608; Moor, 761.

(b) Cro. Car., 519; 2 Ver., 118; 844, 337.

on him, and enables him to act with regard to it for all purposes, with or without the consent of the wife. *Ld. Raym.*, 369; *Com. Dig.*, Adm'r, D; 1 *Salk.*, 39; 4 *Term Rep.*, 617. It is therefore held, that he may surrender or dispose of a term which was vested in her in the capacity of executrix or administratrix, and such surrender or disposition shall be binding upon her. *H. Bl. Rep.*, 810. So a gift or release of any part of the personal property of the deceased, by the husband alone, shall be equally available. *Salk.*, 117. But the wife has no right to administer without the husband; and such acts as have just been mentioned, if performed by her without his concurrence, will be of no validity. *Salk.*, 306; *Went. Off. Ex.*, 207, 208. Should the husband die, the interest never having been divested, will survive to her; but if she die, it will not survive to the husband, for it belonged to him merely in her right as representative of the deceased. *Went.*, 208; *Com. Dig.*, tit. Baron and Femme; 1 *Dyer's Rep.*, 331. It then follows, of course, although in some cases the wife may not make a will, that she may, by a writing in the nature of a will, continue the executorship, with respect to the property thus vested in her *en outre droit*, without the assent of the husband. 2 *Bl. Com.*, 408; *Off. Ex.*, 189; 3 *Bac. Abr.*, 10.

(1) *King v. Holton*, Cro. Car., 603; see, also, *Gratz v. Philips*, 1 *Penn. Rep.*, 333;

The authorities, as to her power over the property, appear to me to be wholly irreconcilable. It is stated, in the Office of Executors, 294, that a *femme covert* may administer, with the consent of her husband: in the same book, 293, that refusal by the husband that she should administer is of no avail. It is also stated, in Perkins' Grant, 7, that a *femme covert* executrix may administer without her husband. It is laid down in 2 Wms. Abr., 319, in a case from H. Bl., 334, that a *femme covert* may act in *auter droit*, as executrix, without her husband; * and the court seems to recognize the doctrine that she may admi- [*194] nister and prove the will, notwithstanding the refusal of the husband. On the other hand, we find it laid down, in Off. Ex., 297, that a wife, without her husband, cannot dispose of the testator's goods, nor release a debt, without payment. (a) This seems to imply, indeed, that she can, where there is a payment. In Off. Ex., 203, it is laid down as good law that the wife could not take upon her administratorship without the consent of her husband. In 3 Wilson, 277, we find the doctrine that the wife cannot administer without the consent of the husband. (1)

(a) 1 Salk., 306.

Chaplin v. Simons, 7 Monr., 339: see, also, Knox v. Picket, 4 Desaus. Ch. Rep., 92; Moore v. Henderson, id., 459. If an executrix marry, and she and her husband, on being sued by a creditor in equity, admit assets, the assets become a debt due from the husband, and may be proved under a commission of bankruptcy against him. *As re* McWilliams, 1 Scho. & Lef., 172. It may be doubted whether it is necessary to obtain a judgment against husband and wife, during coverture, for a *devastavit* committed after marriage, in order to hold the husband after the death of the wife. If the doctrine is well founded, that the husband becomes, on the marriage, vested with all the powers of his wife executrix, and she cannot exercise any of them without his consent, why is not the *devastavit* that of the husband alone? In one American case it is directly decided that the husband is responsible, after the death of the wife, for the correctness of her fiducial conduct during the marriage. Phelps v. Richardson, 4 J. J. Marsh., 215.

(1) The weight of the authorities cited in the text seems to be against the power of the wife to administer without the consent of her husband, and such, also, is the opinion of an eminent writer on this branch of the law. Toller on Executors, 81; and Bac. Abr., tit. Executors and Administrators.

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* CHAPTER XV.

OF DULY CELEBRATING A MARRIAGE; AND OF THE AGE TO CONTRACT A MARRIAGE.

ALL well-regulated governments require that the contract between the sexes to marry should be duly celebrated; and, until there has been a celebration of the marriage, there is not, in point of law, a husband possessed of any marital rights, or a wife who is entitled to the privileges of a wife: That is, if A and B agree to marry, but never do, although they live together as man and wife, A gains no right to the person or property of B; neither would B, on the death of A, be entitled to dower, or any advantages in A's estate.

Previous to the Reformation, the business of celebrating marriages had fallen into the hands of the clergy, under the idea that marriage was a sacrament, the managing of which exclusively belonged to ecclesiastics. At the Reformation, the doctrine that marriage was a sacrament was considered by the Reformers not well founded; but the clergy of the Church of England continued, as officers, to celebrate marriages. It is plain they could not do it by virtue of their clerical character, as they preached the gospel and administered the sacraments; but, being undisturbed in this practice, sanctioned by constant usage, it was considered the common law of the land that a marriage could be duly celebrated by those only who were *infra sacros ordines*; and thus it remained until the establishment of the commonwealth in England, when parliament enacted a statute declaring that marriages

[*196] * should be celebrated by a justice of the peace. At the restoration of kingly government, under the reign of Car. II, the clergy were restored to their office of celebrating marriages; and, by 26 Geo. II, a statute was passed, regulating this subject, in which it was enacted that all marriages, had contrary to the requirements of this statute, were absolutely void, to all intents and purposes, with some particular exceptions.

There is nothing in the nature of a marriage contract that is more sacred than that of other contracts that requires the interposition of a person in holy orders, or that it should be solemnized in a church. Every idea of this kind, entertained by any person, has arisen wholly from the usurpation of the Church of Rome on the rights of the civilian. She claimed the absolute control of marriages, on the ground that marriage was a sacrament, and belonged wholly to the management of the clergy. The solemnization of marriage by a clergyman was a thing never heard of among primitive Christians, until Pope Innocent III ordered it otherwise. The only ceremony in practice among them was, for the man to go to the house where the woman resided, and, in the presence of witnesses, to lead her away to his own house. It is a mere civil transaction, to be solemnized in such a manner as the legislature shall direct, whether by a clergyman or any other person. Moor, 170. (1)

(1) The doctrine that the contract of marriage rests upon the same footing as any other contract, so far as its valid inception is concerned, is probably the doctrine of both the common and civil law. The consent of parties, without any peculiar forms or ceremonies, is all that is required to its valid celebration. The Roman lawyers (says Ch. J. KENT, 2 K. C., 89), strongly inculcated the doctrine that the very foundation and essence of the contract consisted in consent, freely given, by parties competent to contract. *Nihil proderit signasse tabulas, ei mentem matrimonii non fuisse constabit. Nuptias, non concubitas sed consensus facit.* The common law requires no ecclesiastical sanction to render it valid, and considers it merely in the light of a civil contract. If it be made *per verba de presenti*, and is not followed by cohabitation, or *per verba de futuro*, and followed by consummation, it amounts to a marriage, which the parties cannot dissolve, if they are competent as to age and consent, and is just as binding as though made *in facie ecclesie*. This is the established doctrine of the common law, and, subject to certain statute qualifications, has been adopted by most, if not all, of the United States. *Bunting v. Leppingwell*, 6 Coke's Rep., 29; *Jesson v. Collins*, 6 Mod. Rep., 155; 8 C., 2 Salk. Rep., 447; *Milford, Inh. of, v. Worcester, Inh. of*, 7 Mass. Rep., 48; *Fenton v. Reed*, 4 John. Rep., 52; *Jackson v. Winne*, 7 Wend., 47; *Hantz v. Seeley*, 6 Binn. Rep., 405; *Mount Holly v. Andover*, 11 Vt. Rep., 226; *State v. Rood*, 12 id., 396 and see note 1, page 310.

It was held, in *Caujelle v. Ferris*, 26 Barb., 177, that marriage is complete when there is a full, free and mutual consent by parties capable of contracting, although not followed by cohabitation. But a contract to marry, *per verba de futuro*, though followed by cohabitation, when they did not cohabit as husband and wife or hold

In Connecticut, there is a statute regulating marriages; and, by that statute, marriages are to be celebrated by a clergyman, in that county in which he is settled. He has no more authority to marry out of his district, than any other person. A marriage may also be celebrated by a justice of the peace, in the county in which he lives, and by the governor, senators and judges of the superior court, throughout the state; and the statute directs, that the intentions of marriage shall be published and consent [*197] * of parents had, before any person shall celebrate a marriage, inflicting a penalty on those who disobey this regulation. A question has arisen, respecting which there seems to be much difference of opinion. Whether a marriage, celebrated by a person not qualified by statute, is void; and the issue of such marriage bastards. It is not contended, but that the person so celebrating, is liable to a punishment, for disobedience of the statute; that is to say, if a clergyman should celebrate a marriage in a different county than that in which he is settled, he would be liable to prosecution. But would it be void? I would remark, that being a clergyman, gives him no authority to marry, in a county where he is not a settled minister. He has no better right to marry there, than a constable, or any other man. There can be no doubt, that the express words of the statute of George

themselves out as such, does not amount to a marriage in fact. *Cheney v. Arnold*, 15 N. Y. (1 Smith), 345.

Marriage is a civil contract, and all that is essential to its validity is a *present agreement* between competent parties to take each other for husband and wife. But on an indictment for bigamy, the prior marriage must be established by direct proof: evidence of cohabitation and reputation is not sufficient. *Clayton v. Wardell*, 1 Kern. (N. Y.), 230; *State v. Roswell*, 6 Conn., 446; *West v. State*, 6 Wis., 209; *Gahagan v. The People*, 1 Park. Cr. Rep., 378. In all civil cases, involving merely the right of property, the fact of marriage may be proved by evidence of long-continued cohabitation as husband and wife. *Thorndell v. Morrison*, 25 Penn., 326; *Kenyon v. Ashbridge*, 35 id., 157; *Harman v. Harman*, 16 Ill., 85. See also *Caujolle v. Ferrié*, *supra*; *Hyde v. Hyde*, 3 Bradf. (N. Y.), 509; *Henderson v. Cargill*, 31 Mis., 367; *Dumbarton v. Franklin*, 19 N. H., 257; *Cunningham v. Burdell*, 4 Bradf. (N. Y.), 343. In an indictment for adultery, the confessions of the defendant were held proper evidence to prove his marriage. *State v. McDonald*, 25 Mis. (4 Jones), 176. See, also, *State v. Libby*, 44 Maine, 469; *Laws of Vt.*, 1856, p. 16, No. 12.

II, has rendered those marriages, not celebrated as that statute directs, void. But I apprehend that by the provisions of the common law, marriages, although celebrated by a person not qualified by law, or in a manner forbidden by law, are valid. The conduct of the parties concerned, has rendered them obnoxious to the penalties of the law; but such singular conduct, is not a ground for impeaching the validity of the marriage. Until the civil wars, during the reign of Car. I, nothing can be found on this subject. For until that period, it had not been supposed, that any person but one in holy orders, could celebrate a marriage. The mode of pleading, was *per presbyterum in sacris ordinibus constitutum*. After this period, and before the statute of George II, several cases may be found, which will cast light on this subject. During the commonwealth, the power of celebrating marriages, was given to justices of the peace. And they were the only officers whom the law recognized, as possessing authority to marry. Yet, during the existence of this law, it was determined * that a marriage celebrated by one in holy orders, though not a justice of the peace, was valid. [*198]

After the restoration, the power of celebrating marriages, was committed exclusively to the clergy of the church of England, And yet, we find the court of king's bench issuing a prohibition to the spiritual court, because the validity of a marriage had in the face of a separate congregation, was questioned in said court. So, too, we find that a marriage by a preacher in a separate congregation, who was a layman, was recognized as valid: for, on the death of the husband, the wife and children were admitted to their distributive shares. If the marriage had been a nullity, no such distribution could have been made. For the children would not have had a right to the estate of the deceased, being bastards. (a) So, too, we find that such a husband and such a wife, may sue for a debt due to her before marriage. If the marriage had been a nullity, the law would not have endured that the pretended husband should have joined in a suit with his pretended wife, as her husband.

We find, also, that a marriage by a popish priest was held

(a) Salk., 587.

valid; and that in the strongest possible case, the case was, that a man had been married by a popish priest, who, by law, had no authority to marry. This person, so married, during the life of his wife, married again. The matter was brought before the ecclesiastical court, and the second marriage was annulled, upon the principle, that the first marriage was valid. After the marriage was annulled, he was informed against before a common law court of criminal jurisdiction, for bigamy, and convicted. This seems to me, irrefragable proof, that the common law did not consider marriage, celebrated irregularly, as void. (a) And surely it would be very inconvenient, and often extremely unjust to an innocent family, to treat such marriages as void, in a country like ours, where many * marriages are celebrated in [*199] a manner different from the mode prescribed by law; and this is not done from a rebellious spirit, in opposition to the laws; but arises from conscientious scruples; erroneous indeed, but honest. (1)

(a) Cons. Dig., 545.

(1) The legislatures of most of the United States, have thought proper to require a certain degree of notoriety to attach itself to every marriage contract and have also required that it should be entered into pursuant to certain forms prescribed by statute, without which the marriage, as a general rule, will not be considered valid. New York early enacted statutes in alteration of the common law, but attached so many forms to the ceremony, that it was found to be extremely inconvenient, and the doctrine of the common law was restored by a statute of 1839. In Vermont, by statute of 1838, the intention of the parties to the contract, must be published in some public meeting, or posted in a public place, eight days before the intended marriage; which may be solemnized by a justice of the peace, or minister of the gospel, ordained according to the usages of his denomination, residing within the state, a record of which the party solemnizing the same is required to keep and record in the town clerk's office in the town where such marriage is solemnized. In Massachusetts and Pennsylvania, regulations somewhat similar exist, while in South Carolina and Kentucky the doctrine of the common law remains unaltered. In North Carolina, it has been held that a contract of marriage by present words, though followed by cohabitation, was not a legal marriage in that state, unless celebrated by some person in a sacred office, or entered into before some one in a public station and judicial trust. *State v. Samuel*, 2 Dev. and Bat., 177, 181. The statutes of Maine and Massachusetts, on this subject, are nearly similar. A publication of the intention of the parties, and that it be made in the presence and with the assent of a magistrate or an ordained minister of the gospel, is requisite to the valid-

In debt, on bond by husband and wife, given to the wife when sole, the defendant plead that there was no legal marriage. But it appeared in pleading, that there had been a marriage, though not according to law; it was holden, that the plaintiff should recover. (a) In 2 Salk., the same law was recognized in an action of assault and battery by husband and wife, for a battery of the wife.—So, also, in Comb., 478, in action of trespass was maintained, for taking away such a wife.

I discover nothing in our statute, similar to the declaration in the statute of George II; that marriages which are unduly celebrated, shall be void, to all intents and purposes. And although it is strenuously urged, that if a marriage is had in any other manner than that prescribed by the statute, it is void; yet, I

(a) 2 Salk., 478.

ity of the marriage. In Connecticut, nearly the same provisions exist at the present time, as those mentioned in the text, and bear a strong analogy to those at present in force in New Jersey (*Wyckoff v. Boggs*, 2 Halstead's Rep., 138; 6 *ibid.*, 20.) and in Alabama. Turefinen's Dig. Laws of Ala., 576. And as to the law in New Hampshire and Kentucky, see 2 New Hampshire Rep., 268; 3 Marsh. Rep., 370; 2 Kent's Com., 90.

The question now arises, is a marriage in those states, where such statute regulations exist, not entered into in conformity with them, void, so as to render the issue illegitimate? For some purposes it is undoubtedly illegal, but the better doctrine is believed to be that the issue of such marriage is legitimate.

In Vermont, it has been held that an agreement to marry, made between a man and woman, by words declaring such agreement and intention, followed by an uninterrupted cohabitation for several years, though not solemnized according to the laws of the place where the contract was made, will be deemed a valid marriage; *Newbury v. Brunswick*, 2 Vt. Rep., 151; though the person solemnizing the marriage is liable to the penalty; *Ellis v. Hull*, 2 Aikens' Rep., 41. Such, also, is the precise doctrine of *Londonderry v. Obester*, 2 New Hampshire Rep., 268. In Maine and Massachusetts, also, such a marriage is held to be valid, so as to render the issue thereof legitimate. *Milford v. Worcester*, 7 Mass. Rep., 48; *Ligonis v. Baxton*, 2 Greenleaf's Rep., 102. The judicial tribunals of New Jersey, Pennsylvania, Kentucky and North Carolina, have established the same doctrine, and, with one or two exceptions, it is believed to be the universal law of the United States. *Wyckoff v. Boggs*, 2 Halst. Rep., 138; 3 Marsh. Rep., 370; 2 Watts' Penn. Rep. In North Carolina, by statute, and in Tennessee, by judicial decision, a marriage not solemnized according to the existing laws, before some competent person, is held to be illegal and void in respect to a prosecution for bigamy. Statutes N. C., 1715, 1741, 1778. *Bahaw v. Tennessee*, 1 Yerger's Rep., 117; but it may well be doubted whether they would extend the doctrine so far as to bastardize the issue of the marriage.

never heard it urged, that if a marriage took place, although there was no publishment, or consent of parents, that this marriage was void. And yet, the statute expressly forbids the clergyman or magistrate to celebrate a marriage, unless publishment has been made, and consent of parents given. If the prohibition, in the one case, render the marriage void, why not in the other case. For the clergyman and magistrate are as much prohibited to marry, where there is no publishment and consent of parents, as others are, who are not clergymen or magistrates. I know it has been said, that in the one case there is a penalty affixed, and in the other there is none. I do not perceive the force of this reasoning: Surely, punishment can never legalize the offense committed: unless we suppose the object of the statute was, to allow clergymen to marry without publishment [*200] or consent, provided he would pay * the penalty. That was not the design of the statute. The manifest intention was, to prevent the offense: and in case it was committed, to punish it. But, supposing the punishment of the offense could legalize the marriage, where there is no punishment or consent: I apprehend that this idea, if it be correct, would render a marriage by a person not qualified, valid. For, although there is no penalty affixed in the paragraph, for the breach of that statute, yet, to disobey the salutary regulations of a statute, and to do that which the statute forbids is a misdemeanor; and punishable, as such, by the common law (1)

(1) See preceding note. There is scarcely any principle of law better supported by the authorities, than that which declares, that a marriage not solemnized according to the provisions of the existing statute, in the mere matter of form, is a valid marriage. It will be first noticed, that most of these statutes impose a penalty upon the person assuming to join others in matrimony, who is not legally authorized, and that in other respects the statutes are merely directory. Now, it is a principle both salutary and well settled, that the official acts of a person not duly qualified, are valid as to third persons and the public, when the neglect of the qualification is punished by a mere penalty, and where the acts themselves are not in their nature void, or are not expressly made void by statute. 7 John. Rep., 554; 10 Mass. Rep., 301; 1 Hawk. P. C., 17, b. 1, c. 8. And perhaps even the officer himself may be protected under them. *Jones v. Gibson*, 1 New Hamp. Rep., 268; *Rex v. Williams*, 2 Maule and Sel., 141; *Margate Pier Comp. v. Harmon*, 3 Barn. and Adol., 266. Before the enactment of the statute 26 George II, the statutes in

The age when persons are liable to contract marriage is, in males, fourteen; in females, twelve. Minors may, indeed, marry at any age; but the validity of the marriage depends upon the parties agreeing to it, at the age of twelve in females and fourteen in males. As long as the privilege of disagreement exists with one party, so long it does with the other, although of greater age—as, if the male be sixteen, and the female eleven. As she has a right to disagree to the marriage at twelve, so will he have the same privilege, although he is at that time seventeen. (a) (1)

(a) 6 Co., 22; 7 Id., 43; Roll. Abr., 340; Co. Litt., 32.

force in England were very similar to those of the several states. That statute rendered the marriage illegal and void, if not solemnized according to the existing regulations, and expressly avoids it for various other causes, which have rendered it (says Ch. J. WOODBURY, in 2 New Hamp., 277,) a pandora's box of evils. Before the passing of that act, such marriages were held not to be void. See *Rex v. Brampton*, 10 East, 282; *Fielding's case*, 5 St. Trials, 610; *Tenney v. Brown*, 1 Siderfin, 64; 1 Bl. Com., 408; *Com. Dig. Bar. and Feme, B.*; *Fenton v. Reed*, Burr., 91. This statute was enacted in 1752, but it can hardly be pretended, that, although it was passed while we were colonists of Great Britain, as the principles upon which it was founded are so entirely hostile to the spirit of our institutions, that it could ever be held to extend here by construction. The tenure of much of the property in England, the pecuniary character of the marriage contract, under their form of government, the perpetuity of estates in a landed aristocracy, and often the great and pecuniary interest of parents and guardians, says Mr. Woodbury, furnishes a course of policy and reasons for this rigor, from which we are altogether happily exempt. The advantages of an open and notorious solemnization of the marriage contract, is no doubt advantageous to the interest of society, and it was for the purpose of giving it a greater degree of notoriety, that these statutes were enacted; but even without these forms, for they are nothing more, where a contract which changes so thoroughly the relations of the parties to community, is first executed by them with deliberation, and afterwards consummated by cohabitation, it should not be lightly endangered, and every thing done under it disannulled.

A case is rarely to be found, which enters into the discussion of a branch of the law more thoroughly than the one from 2 N. H. does of this. Whatever may be said of the general character of the New Hampshire reports, the opinion of Ch. J. WOODBURY, in the case above cited, for profound legal knowledge and the power of arriving at correct conclusions, will lose nothing by a comparison with those of the best of the English judges.

(1) The civil law established the same age of consent in the parties to the marriage contract with the common law; and it was probably from the civil law that the principle was first adopted. 1 Bl. Com., 436; Co. Litt., 78, 6; Inst., 1-10; De

A wife cannot be endowed until she is nine years of age. And the reason given, why she can be endowed at that tender age, is a very singular one. If the wife of a minor, which minor is under the age of fourteen, should have a child, it will be a bastard.

I have never heard in this State of any marriage when the persons married had not arrived at the age of discretion. And

Nuptia. But this has been considerably varied by statute regulations in several of the States. In Vermont, the age of consent is still determined by the rules of the common law; but if either party is a minor, the person solemnizing such marriage is forbidden to complete it without the consent of the parent or guardian. R. S., 1839, p. 219. In New York, by the statute of 1830, before referred to, the age of consent was raised to seventeen in males and fourteen in females; but this statute was subsequently repealed, which left the provisions of the common law in force. In Massachusetts, the provisions of the New York act of 1830 have been adopted and still continue in force. Mass. R. S., 1835; while in Michigan, Ohio and Indiana the male is required to be eighteen and the female fourteen, in order to contract a valid marriage. Act Mich., 1832; Stat. Ohio, 1831; Indiana R. S., 1838. In Illinois the age of consent is fixed at seventeen in males and fourteen in females. Stat. of Ill., 1858, vol. 1, p. 579. And in Iowa, sixteen in males and fourteen in females. Revision of Iowa Laws, 1860, p. 427, sec. 2515. In Minnesota, eighteen in males and fifteen in females. Stat. of Minn., 1849, 1858, p. 460, ch. 52, sec. 2; and by section 7 of same chapter, if the male be under twenty-one or female under eighteen, unless either shall have been married before the consent of the parent or guardian is necessary. See *Bennett v. Smith*, 21 Barb., 439, where it is held that the consent of parents is unnecessary in New York. *Purton v. Hervey*, 1 Gray (Mass.), 119.

All these regulations are merely conventional, and, it almost seems, dictated by a mistaken notion of policy. It may be said that they are useful to prevent early marriages; but in Vermont, where the common law on this point remains unaltered, an instance of a marriage below the age fixed by these statute regulations is rarely, if ever, met with. The rule of the civil and common law was in force in France prior to the Revolution, but by the Code Napoleon, No. 144, 148, it was raised to eighteen in males and fourteen in females, though the marriage might be rendered valid for good cause shown. In Massachusetts, by statute, marriages within the age of consent are valid if followed by voluntary cohabitation. Stat., 1835.

With regard to the avoidance of the marriage by either party, while one is within the age of consent, it is believed that the doctrine of the text does not hold where the party above the age of consent is an adult. It has been held that in such case the party would be absolutely bound, though the contract might be avoided at pleasure by the infant if under the age of consent. *Holt v. Ward* *Clarendon*, 2 Strange's Rep., 937.

I think it probable, that such premature marriages would never receive any sanction from our courts. Such a contract, I apprehend, is void, upon the principle that it is a contract against sound policy, and *contra bonos mores*.

* Whether a marriage, regularly solemnized, which was obtained by duress of the *femme*, was void or not, has [*201] been the subject of very discordant opinions. See Viner's Abr., 35th page, and the authorities there cited.

It is difficult to conceive why a contract, confessed to be the most important that can be entered into, should be valid when obtained by duress, when all other contracts obtained by duress are void. It was an offense at common law forcibly to take away a woman and to marry her. By various statutes in England, it is made felony so to marry a woman of substance. It is difficult to conceive that such a marriage could ever have been deemed valid. For the case itself precludes the idea of contract, which is essential to render a marriage valid. But the admission, as a witness, of such a wife, against such a husband, is conclusive proof that such marriage is void. 1 Hale, 661; State Trials, 455.

The authorities also teach us that a marriage by an idiot is valid; and assign, as a reason why it should be so, that an idiot can consent to marriage. (1) If his consent to this contract binds

(1) Where the authorities teach any such doctrine, they teach what is not law. Capacity is one of the essentials of every contract, and the law has ever refused to enforce an agreement against an idiot or lunatic made with them. In later times, intoxication in one of the parties has been held sufficient to render the contract voidable. *Burrett v. Buxton*, 2 Aik. Vt. Rep., 167. And it is almost nonsense to say, that it might be avoided by this, and not by idiocy or lunacy. The law is, that every such marriage is void *ab initio*, and no sentence of avoidance is absolutely necessary. 2 Phillimore's R., 18, 69. But for the purpose of clearly ascertaining whether such cause exists, and to avoid the hazard of annulling what might possibly be a legal marriage, a tribunal to declare it void should exist. For this reason, suits to annul such marriages have often been instituted in the spiritual courts in England. 2 Kent's Com., 76, and cases there cited.

When a marriage ceremony is performed while one of the parties is insane from *delirium tremens*, the marriage is void. *Clement v. Mattison*, 3 Pick., 98; *True v. Ranney*, 1 N. H., 52. And a valid marriage cannot be contracted by a lunatic or insane person, except during lucid intervals; but mere weakness of mind, unless it amount to derangement, is not sufficient to avoid a marriage. *Rawdon v. Rawdon*, 34 Ala., 565; *Cole v. Cole*, 5 Sneed (Tenn.), 57.

him, why is he not bound by all other contracts to which he consents? If his want of understanding be such that he ought not to be bound by other contracts, neither ought he to be bound by his contract of marriage.

[*202]

* CHAPTER XVI.

OF LAWFUL AND UNLAWFUL MARRIAGES. OF DIVORCES AND ALIMONY.

FROM the statute 32 Henry VIII, we are to learn who may intermarry. That statute declares that no prohibition, God's law excepted, shall impeach any marriage without the Levitical degrees. This statute amounts to a declaration that a marriage betwixt the parties who are so nearly related as to be within the Levitical degrees of kindred, is not a valid marriage. So, too, all marriages forbidden by the law of God are invalid. But what marriage is there forbidden, the statute does not inform. So that it is only from the adjudications of courts that we can learn what marriages are considered as forbidden by the law of God to which that statute alludes. The courts have determined that the marriages forbidden by that statute are the following: 1st. A second marriage, where there has been a prior marriage to another person, who is then alive; 2d. Where there has been a prior contract; and, 3d. Where there is imbecility. Whenever a marriage is invalid by reason of any of the causes mentioned, they are considered as husband and wife until divorced; except in the case of a second marriage, where there has been a prior marriage to another person who is then alive. In this case the second marriage is considered as absolutely void, and there is no necessity of a divorce; and the parties are not considered as husband and wife *de facto*. Relationship by affinity is as much considered within the Levitical degrees as by consanguinity.* The husband is related to all the blood relations

[*203]

of the wife; and so the wife to those of the husband. But the blood relations of the husband are not related to the blood relations of the wife. So that John and Samuel Stiles, two brothers, may marry Sally and Betsey Rowe, two sisters. Or, if J. S. should marry Polly Camp, and Sally Stiles his sister should marry Thomas Jones, and John and Sally should both die, Thomas and Polly might intermarry. From a great variety of cases in which it has been adjudged that the relationship was within the Levitical degrees, and also that it was without, it may be fairly inferred that all marriages related in the ascending or descending line are forbidden. That, in the collateral line, computing by the civil law, the prohibition does not extend beyond the third degree of kindred. This computation is made by beginning with one of the parties and counting up, in the ascending line, one for each ancestor, until you come to the common ancestor of both parties; then counting down, through the ancestor of the other party, until you reach the party. And if it be found that the number of degrees exceed three, the parties may marry, as not being within the Levitical degrees. For instance, John Stiles marries Ann Stiles, daughter of his brother Thomas. Is the marriage valid? Try it by the rule laid down. From J. Stiles to his father Reuben is one degree; Reuben is the common ancestor of John Stiles and Ann, being the father of John and grandfather of Ann. Count down, then, from Reuben to Thomas, the father of Ann, which is two degrees; from Thomas to Ann, which is three degrees. Of course, the marriage is invalid, the parties being in the third degree. Suppose Charles Stiles should marry Polly Stiles: Charles was the son of John, and Polly was the daughter of Thomas: make the same trial as before. From Charles to John is one; from John * to Reuben is two; [*204] Reuben is the common ancestor of both Charles and Polly. Count down, then, to Thomas, the father of Polly, which is three: from Thomas to Polly is four. The marriage is valid, for the relationship is in the fourth degree. (a) (1)

(a) Com. Dig., 597.

(1) In Vermont, by express statute provision, marriage is forbidden between persons within the third degree of relationship, either lineally or collaterally. Rev.

It has been determined that a marriage with an illegitimate relation in the same degree is invalid. This is repugnant to the principles of the common law, which recognizes no relationship which the illegitimate bears to any person but his own issue. To marry a wife's sister was forbidden by statute, but not by the

Stat., Vt., 1839, p. 318. And a fair construction of the statute would probably prohibit marriages between all relatives of the ascending or descending line. In Massachusetts and New York, nearly the same statute prohibitions exist, and their violation is punished by indictment and imprisonment. In New York it has been held that marriages between brothers and sisters in the collateral line were, equally with those in the line of consanguinity, unlawful and void. *Wightman v. Wightman*, 4 John. Ch. Rep., 343; Rev. Stat., N. Y., vol. 2, p. 189, sec. 3; R. S., Mass., 1836, part 4, tit. 1, chap. 130. In Michigan and Ohio, marriages between nearer of kin than first cousins (fourth degree) are declared unlawful. Territorial act of Michigan, April, 1832; Rev. Stat., Ohio, 1831. In Louisiana, marriages within the Levitical degrees are unlawful and void. Civil Code, art. 97. The precise limits, fixed by nature itself, within which this union should not take place, cannot, perhaps, be satisfactorily ascertained; but so far as relatives in the ascending or descending lines are concerned, any union of this kind between persons standing in them is clearly unlawful and void; for such unions can but tend to confound the marital rights and duties with those of parent and child, in their direct as well as their remoter relations. One step, also, towards collateral relations, is too clearly settled to be here noticed, and even an incestuous connexion between uncle and niece has been held, upon high authority, to be highly offensive to the laws of society, and strongly tending to the pollution of the sanctity of private life. Code Justin., 5, 8, 2; *Burgess v. Burgess*, 1 Hagg. Ecc. Rep., 386. But the general tendency of all enlightened nations has been toward one certain limit, and in many of the States, where this is the subject of statute regulation, that limit has been fixed at the third degree of collateral relationship, and all marriages within that are void. Certainty is always most important in the law, and, for this reason, it might be unwise to disturb these settled regulations; but, were the law still unsettled, it would be better to place the limit one step further off, and prohibit marriages between all relations standing within the fourth degree.

The reasons before assigned would seem to be sufficiently powerful against near relations; but another, and still more powerful one, exists, more appropriate for the discussion of the physiologist than the lawyer. See Combe, Const. of Man, *passim*.

In New York a marriage is void when either of the parties has previously been divorced for his or her adultery. *Crosey v. Ogden*, 11 N. Y. (1 Allen.), 226; *Crosey v. Sweney*, 27 Barb., 310.

Under the statute of Illinois, allowing marriages "not prohibited by the laws of God," a marriage of a man with the daughter of his sister is voidable during the life of the parties, but not void. *Bonham v. Badgely*, 3 Gilman R., 372. A marriage is not void, by the laws of South Carolina, between uncle and niece. *Bowers v. Bowers*, 10 Rich. Eq., 361.

Levitical law, unless the marriage was had during the lifetime of the wife. Polygamy, among the Jews, was in constant practice among the best men, who were distinguished for piety. 2 Vent. 17. And this practice is not condemned by the sacred writers. (1)

I apprehend that precontract is not now considered as rendering a marriage null. In case of imbecility, it must be such as attended the party previous to the marriage, to render it invalid, and not that which, by accident, misfortune or infirmity, arose afterwards. Such marriages may be dissolved by a sentence of divorce in the spiritual courts; and the divorce in these cases is a *vinculo matrimonii*, by which the issue are bastardized. Although the law considers such marriages as good until there is a sentence of divorce, yet the divorce proceeds upon the ground that the marriage is void *ab initio*; (a) and when sentence is rendered, the marriage is considered as void *ab initio*. But if the husband or wife had died before sentence of divorce, the marriage could not have been impeached. It will be remembered that, whenever a divorce is a *vinculo matrimonii*, it is for some cause which existed prior to the marriage. (b) (2)

The spiritual courts have power, also, to divorce for causes supervenient to the marriage; but the divorce, in such cases, is only a *mensa et thoro*. This operates to separate [*205] husband and wife, but does not dissolve the marriage; and the parties, after such divorce, cannot marry while both parties are

(a) 1 Bol., 380; 5 Co., 92; Carth., 271.

(b) Co. Litt., 285; 1 Salk., 171.

(1) See Oro. Eliz., 858; 1 Salk., 121. And it is made an indictable offense in many of the States of the Union. R. S. of Vt., 1839, p. 443; Stat. N. C., 1790, 1800; Stat. Ohio, 1831; R. S., Mass., 1835; 2 R. S., N. Y., 139, 687.

(2) There are, says Lord COKE, two kinds of divorces: one, a *vinculo matrimonii*, and the other a *mensa et thoro*. *Divortium, dicitur à divorcendo, or divortense, quia vir divoritur ab uxore*. Divorces a *vinculo matrimonii* are these: *causa metus, causa impotentia seu frigida, causa affinitatis, causa consanguinitatis*. Co. Litt., 235, a. In some of the States, as Vermont, New York, Massachusetts, Delaware, Ohio, North Carolina, Alabama, Illinois and Connecticut, a divorce may be granted *causa impotentia* in either of the parties. Vt. R. S., 1839, 322; 3 R. S., N. Y., 3d ed., 233; Dane's Abr., ch. 43, art. 9, sec. 14; Benton v. Benton, 1 Day's Rep., 111; Rev. Laws, Ill., 1833. Upon common-law principles, it is clear that a divorce may be

living. Neither does it deprive the husband of any marital right, as it respects her property. (a) He is entitled to the usufruct of her real property; and if a legacy is bequeathed to her, it belongs to him. It is true, however, that when a husband has attempted to sell a term for years, which he had in right of his wife, equity has granted an injunction. (b)

When there is a divorce *a mensa et thoro*, *alimony* is allowed to the wife. If she be injured in her character or person, she may sue without her husband, and recover; and the husband cannot release the costs, although he is entitled to all the property which comes to her, except what she obtains by her personal industry; yet he cannot release the costs in such case, because they come in lieu of what she spent out of her alimony, which is properly her own. 3 Buls., 264; Roll. Abr., 343.

The causes for which a divorce *a mensa et thoro* may be obtained are, adultery, cruelty, and a well-grounded fear of bodily hurt. The ecclesiastical courts are vested with power to compel the husband to allow the wife maintenance, which is called alimony; and to recover this, she can maintain a suit against her husband. In cases of divorce *a mensa et thoro*, the issue are not bastardized. (c)

Notwithstanding the spiritual courts cannot divorce, for super-venient causes, *a vinculo matrimonii*, this is sometimes done by an act of parliament. (d) (1)

(a) Cro. Car., 462.

(b) Moor, 665; Cro. Car., 462.

(c) Ca. Can., 44; id., 184.

(d) Co. Litt., 235.

granted *causa impotentia*. 5 Co., 9; Moor, 225; Dyer, 178, pl. 40; Bay's case, Noy., 72; Morris v. Webber, Moor, pl. 366. As to divorces *a vinculo* generally, see Bacon's Abr., tit. Marriage and Divorce, F. In Vermont, impotency from idiocy has been held no good cause for a divorce. Norton v. Norton, 2 Aik. Vt. Rep., 188.

In California, Indiana, Ohio, Iowa and Minnesota, a divorce may be granted for impotency. Iowa Laws, 1860, p. 429, sec. 2534; 1 R. S., Ohio, 1860, p. 509; Statutes of Minn., 1849, 1858, ch. 53, p. 463; Compiled Laws of California, 1853, ch. 116, p. 371; 2 R. S. Indiana, ch. 4, sec. 7.

(1) The distinction between divorces *a mensa et thoro* and *a vinculo matrimonii* is not kept up in several of the United States. Thus, in Vermont, Connecticut, Ohio, Indiana and South Carolina, there can be no divorce short of *a vinculo matrimonii*; but in some of them, as in Vermont, the one kind is granted for the same as the other, at common law, as for intolerable severity, willful desertion, adultery, refusal

The law respecting divorces, in the State of Connecticut, is a very different system from the English system. The superior court of this state is vested with power to divorce, in four cases, viz., fraudulent contract, adultery, willful absence for three years,

ing to support the wife, being of sufficient ability so to do, sentence of confinement in the state prison, &c. Rev. Stat., Vt., 1839; while in Louisiana, Massachusetts, New Jersey, Kentucky, Mississippi and Michigan, divorces *a mensa et thoro* are granted for the usual common-law causes. *Savole v. Ignogoso*, 7 Louis. Rep., 281; Mass. Rev. Stat., 1835; Act of Mich., 1833; *Lockridge v. Lockridge*, 3 Dana's Ky. Rep., 28; *Holmes v. Holmes*, Walker's Miss. Rep., 474; *Elmer's Dig.*, 140. In Vermont, but one kind of divorce being known, and that from the bond of matrimony, it of course bars the wife of dower; but, by the common law, a divorce *a vinculo* does not bar her dower, or put an end to any right of either with regard to the property of the other. *Powell v. Weeks*, Noy., 108; *Lady Stowell's case*, Godb., 145. But Mr. Hargrave, in a note to Co. Litt., 32, a, says that, according to Rolle's report of the last case (Roll. Abr., tit. Bar. & Fem., vol. 1, p. 684), it was adjudged that the divorce for adultery was a bar of dower, and Lord THURLOW is reported to have said, in the debate in the House of Lords upon Shadwell's divorce bill, that, in a divorce *a mensa et thoro* for adultery, a woman forfeits her dower. Woodf. Parl. Rep., vol. 2, p. 339.

In Vermont, when an action is brought for divorce, for causes which accrued in another State, the libellant must have been a resident of Vermont for three years. Compiled Laws of Vt., 1850, p. 398.

The causes for a divorce *a vinculo*, in Iowa, are, impotence; a former husband or wife living; adultery; desertion for two years; conviction of felony after marriage; habitual drunkenness; and inhuman treatment. Iowa Laws, Revision of 1860, p. 429. And the parties divorced may marry again. In Minnesota, the causes for divorce *a vinculo* are, adultery; impotency; imprisonment in the penitentiary; willful desertion for one year; cruel treatment by either of the other; habitual drunkenness for one year next preceding the bringing of the action. And when made fully to appear that they cannot, for *any other reason*, live peaceably and happily together, and that their welfare requires a separation. Statutes of Minnesota, 1849, 1858, ch. 53, sec. 7. In Indiana, the causes of divorce are, adultery; impotency; abandonment for one year; cruel treatment of either party by the other; habitual drunkenness of either, or the failure of the husband to make reasonable provision for his family; conviction of an infamous crime; and *any other cause* for which the court shall deem it proper that a divorce should be granted. 2 R. S., ch. 4, sec. 7. In Mississippi, a divorce *a vinculo* may be granted after the parties have lived separate under a divorce *a mensa et thoro* for three years, to the party who obtained such former divorce. Laws of Miss., 1856, ch. 78, p. 166. In Massachusetts, in addition to the ordinary causes for a divorce, the statute provides that, when either party has separated from the other without his or her consent, and united with a religious sect or society that professes to believe the relation of husband and wife void or unlawful, and has continued with such sect three years,

[*206] in a total neglect of all * conjugal duties, and seven years' absence, unheard of. In the last case, however, it has been holden, that it was not necessary that a divorce should be had, to entitle the party to marry again; the law proceeding upon

refusing during that time to cohabit with the party who has not united with such sect or society, a divorce may be granted. General Stat., Mass., 1860, p. 532, sec. 1. The only grounds of total divorce in Georgia are those recognized by the common law: precontract, consanguinity, affinity and corporeal infirmity. *Head v. Head*, 1 Kelly, 191.

It was held in Pennsylvania that it was not a defense to a bill for divorce for the cause of adultery, that the wife committed the offense while insane. *Matchin v. Matchin*, 6 Barr. (Penn.), 332. But the contrary, a much more reasonable doctrine, was held in *Wray v. Wray*, 19 Ala., 522. On divorce for adultery, in New York, when the husband is the guilty party the wife is not barred of her dower, but when she is the guilty party she is barred. *Wait v. Wait*, 4 Comst. (N. Y.), 95. Held in Alabama that a decree of divorce *a vinculo*, in favor of the wife, defeats and determines all the rights and interests of her husband in and to her lands, and also the rights of others claiming under a mortgage executed by him, and restores her rights precisely as if her husband had died. *Boykin v. Rain*, 28 Ala., 332. Impotence, in order to constitute a ground of divorce, must exist at the time of the marriage, and must be incurable. *Bascom v. Bascom*, 5 Foster (N. H.), 267; *Ferris v. Ferris*, 8 Conn., 166.

Held, that the courts of the State have jurisdiction to grant a divorce whenever the complainant is domiciled within the State where the action is brought, although the marriage and cause of divorce occurred elsewhere, and although the defendant has never been in the State or been served with process. *Hubbell v. Hubbell*, 3 Wis., 662; *Gleason v. Gleason*, 4 id., 64. And publication of notice, in a suit for divorce, was held sufficient service on the absent defendant to give jurisdiction without issuing a summons. *Green v. Green*, 7 Ind., 113. But in Pennsylvania, if the marriage took place in a foreign country, and the defendant never lived in that State, a divorce cannot be granted. *Bishop v. Bishop*, 3 Penn., 412. Under the act concerning divorces, in California (Laws, 371), declaring that an applicant must have resided in the State six months immediately preceding the application, the wife's residence is of no importance, provided the husband has resided in the State the requisite length of time. *Kashaw v. Kashaw*, 3 Cal., 312; see, also, *Wilcox v. Wilcox*, 10 Ind., 436. Under the laws of Missouri, a petition for divorce must be dismissed unless the applicant is a resident of that State. *Kruse v. Kruse*, 25 Mia., 68. In Massachusetts it was held that a decree of divorce *a vinculo*, obtained in another State, between parties residing in that State, for a cause which would not be a cause of divorce in that State, and at the suit of a party who went into the other State for the purpose of obtaining it, was void in Massachusetts, even if the other party appeared and answered. *Chase v. Chase*, 6 Gray (Mass.), 157. And in New York, where a man, being a resident of that State, having a wife who also resides

the ground, that the person so not heard of, for seven years, is dead. (1)

there, goes to another State and obtains there a divorce without any service by process upon or notice to her or any appearance by her, such decree is void and unavailing for any purpose whatever. *McGriffert v. McGriffert*, 30 Barb., 69; *Vischer v. Vischer*, 12 id., 643; *Borden v. Fitch*, 15 John., 121. It was held, in *Coble v. Coble*, 2 Jones' Eq. (N. C.), 392, that, *for a divorce for cruelty*, no actual violence was necessary, but a false charge of infidelity to her marriage-vow or a refusal to recognize her as his wife. See, also, *Pinkard v. Pinkard*, 14 Texas, 356. In a suit by a wife against a husband for a separation on the ground of cruelty, nothing in the answer will be considered as impertinent which tends to show the conduct of either towards the other. *Hopper v. Hopper*, 11 Paige, 46.

See the following cases on cruelty as a cause of divorce generally: *Breinig v. Meitzler*, 23 Penn., 156; *Eshbach v. Eshbach*, 23 id., 343; *Brown v. Ackroyd*, 34 Eng. L. & E., 214; *David v. David*, 27 Ala., 222; *Bowers v. Bowers*, 19 Mia., 351; *Hooper v. Hooper*, 19 id., 355; *Harmon v. Harmon*, 16 Ill., 85; *Shaw v. Shaw*, 17 Conn., 189; *Richards v. Richards*, 1 Grant's Cases (Penn.), 389; *Everton v. Everton*, 5 Jones (N. C.), 202.

(1) Willful desertion, or unheard of absence, special by statute provisions will be a sufficient cause of divorce in many of the United States. See statutes of Connecticut, Indiana, Illinois, Kentucky, Maine, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania and Vermont. In some of them, as New Jersey, Massachusetts and Maine, willful desertion for five years will be sufficient to authorize the decree. Stat. Maine, 1809; Act Mass., 1838; do. New Jersey, 1820.

In Michigan, Iowa and Missouri, desertion for two years is sufficient for a divorce. Compiled Stat. of Mich., 1857, ch. 108, p. 954; Iowa Laws, 1860, p. 429, sec. 2534; R. S. Mia., 1845, ch. 53, p. 426. In Mississippi and California desertion for three years is sufficient. Revised Code of Miss., p. 333, Art. 11; Comp. Stat. of Cal., 1853, ch. 116, p. 371. In Minnesota and Indiana, willful desertion for one year is sufficient, Stat. of Minnesota, 1849, 1858, ch. 53, p. 463; 2 R. S. of Ind., ch. 4, sec. 7. In New York, the abandonment of the wife by the husband, and his refusal or neglect to provide for her, is a cause of divorce *a mensa et thore*, 3 R. S., 5th ed., p. 238. Where a husband absents himself from his wife for the space of five years, without being known to her to be living during that period, and she then marries another person in good faith, supposing her former husband to be dead, her second marriage will be void only from the time its nullity shall be pronounced by a court of competent jurisdiction. *Cropsey v. McKinney*, 30 Barb., 49. Held in Wisconsin, that to enable a husband to obtain a divorce on the ground of desertion, for the reason that his wife refused to remove with him from one state to another, he must show that her refusal was *unreasonable*, and that his conduct was such that it would be safe for his wife to live with him. *Gleason v. Gleason*, 4 Wis., 64. In Illinois, desertion for two years is sufficient for divorce. *Ashbaugh v. Ashbaugh*, 17 Ill., 476. Held, that, in Pennsylvania, the refusal of a wife to accom-

The construction of the term, fraudulent contract, has, by a decision of the late court of errors, been restricted to a very narrow compass, and that only one species of fraud is meant to be the cause of a divorce, to wit: imbecility, which is nowhere mentioned as a cause of divorce in our statute. (1) The practice of the superior court, before this decision, was very different from this. True, indeed, they granted divorces for imbecility, on the ground of fraud; but they also granted divorces, where the fraud was such as would vitiate other contracts. Certainly, if nothing more was meant by the term, fraudulent contract, than imbecility, it is a very awkward expression, to convey that precise, definite idea, which is affixed to the term imbecility. If the legislature meant to convey the same idea by the term, which it ordinarily imports, I apprehend it was a very natural provision. If it be founded in justice, that the contracts which

pany her husband to a foreign land, was not a desertion. *Bishop v. Bishop*, 30 Penn., 412. But it was held, in South Carolina, that a husband has a right to establish his domicile, without the consent of his wife, in any part of the world, and it is the duty of the wife to follow him. *Hair v. Hair*, 10 Rich. Eq., 163. Though a wife desert her husband without cause for a few months, yet, if she go back and confess the wrong and offer a return, and request admission again into the family, and he refuses, and for five years neglects to make provision for her support, this constitutes a desertion on his part, for which she may sustain a libel for divorce. *Fellows v. Fellows*, 31 Maine, 342. Where a wife obtained a divorce in New York and subsequently the husband went to Michigan and obtained a divorce *a vinculo* on a charge of willful desertion; the wife not having appeared, nor having notice except by publication in a newspaper of that state, the divorce was held a nullity. *Vischer v. Vischer*, 12 Barb., 640. Willful neglect without desertion is a ground of divorce in California. *Washburn v. Washburn*, 9 Cal., 475. A libel for divorce on account of abandonment and refusal to cohabit, should contain in some form an allegation, that the abandonment and refusal continue up to the time of filing the bill. *Kimball v. Kimball*, 13 N. H., 222; *Davis v. Davis*, 37 *Ibid.*, 191.

(1) In Ohio, divorces may be granted in case of fraudulent contract in other cases than the one mentioned in the text. 1 R. S., 1860, ch. 37, p. 509. For provisions of the statutes of different states in regard to impotency and other causes of divorce, see note to marginal page 205.

In New York, previous to the revision of the statutes, corporeal impotence was held not to be a sufficient ground for granting a bill of divorce. *Burtis v. Burtis*, 1 Hopkins' R., 557. But, by the Revised Statutes, physical incapacity is made a ground for divorce, if suit is brought within two years after the marriage. 3 R. S., 5th ed., ch. 8, pp. 233, 235.

respect ordinary matters, should be treated as void, when obtained by fraudulent practices, why then should a contract, the most important that can be entered into, be deemed inviolable, when obtained by such fraudulent practices?

A man, by the foulest fraud, gets into possession of the property of his neighbor. By a contract thus basely obtained, it not only renders the contract void, but, in many instances, is a felony. The common sense of mankind must revolt at the idea, that when a man, by the same abominable fraud, obtained the person of an amiable woman, and her property, that the law should protect such contract, and give it the same efficacy as if fairly obtained. The truth is, that a contract which is obtained * by fraud, is, in point of law, no contract. The fraud [*207] blots out of existence whatever semblance of a contract there might have been. A marriage, procured without a contract, can never be deemed valid. There is no more reason for sanctioning a marriage procured by fraud, than one procured by force and violence. The consent is as totally wanting, in view of the law, in the former, as in the latter case. The true point of light in which this ought to be viewed, I apprehend, is, that the marriage was void, *ab initio*; but it is necessary to have a divorce by the court, since the marriage has been celebrated, that all concerned may be apprized that such marriage has no effect. Upon the same principle that chancery decrees contracts, unfairly obtained, void, all the apprehension that is created in the mind of conscientious men, of the illegality of separating husband and wife, is dissipated. If this view be correct, for they never were husband and wife, one essential ingredient to the contract is wanting, viz., consent.

In the case of adultery, it may be proper to remark, that it is the adultery known to the common law, as understood in the spiritual courts in England, which furnishes cause for divorce; which is, where a married person has illicit commerce with any person. It is not material whether the person with whom the offense be committed, is single or married; which is a more extensive offense than the adultery punished by our statute, which does not punish the offense of illicit commerce as adul-

tery, unless committed by or with a married woman. When a divorce takes place for this offense, the wife is, on the death of the husband, entitled to her dower, if her husband be the faulty party. (1)

(1) Marriage, in all Catholic countries, is considered as a sacrament, and in none of them, can be dissolved for the adultery of either party. 2 Kent's Com., 103, and authorities there cited. But with few exceptions, all countries and states governed by the common law, authorize the granting of the bill for this cause. To a proposition so familiar to every lawyer, it is not here deemed necessary to cite a long array of authorities. The doctrine held in New York prior to 1787, was that the marriage covenant could in no case be legally dissolved, but the first infraction of this rule by the legislature, was to authorize the granting a divorce for adultery Stat. N. Y., 1787. Although now it does not follow that a divorce will be granted for this cause upon application of either party. The application must come from the innocent party, and may at any time be defeated by showing a corresponding infidelity on the part of the other. In South Carolina, it is said that no instance can be found of a divorce granted, either by sentence of a court of justice or act of legislature since the Revolution. S. C. Eq. Rep., Vol. 1. These are believed to be the only exceptions to the common law rule, though a few others may exist. It is also well settled that a divorce for adultery does not forfeit the dower of the wife, where the husband is the adulterer. Bac. Abr. tit. Marriage and Divorce, F. Ass, chap. III, in notes.

Moyler v. Moyler, 11 Ala., 620; Wait v. Wait, 4 Comst. (N. Y.), 95. In a suit for a divorce on the ground of adultery, the allegation of adultery may be proved by circumstances. Van Epps v. Van Epps, 6 Barb., 320. The guilty party cannot marry again. Cropsy v. Ogden, 11 N. Y. (1 Kern.), 228. And after a divorce for adultery, the marriage contract is at an end, and if the guilty party marries again, he is not within the statute against bigamy. But such marriage is prohibited by statute in New York, and the guilty party so marrying is guilty of a misdemeanor. People v. Hovey, 5 Barb., 117. If a wife leaves her husband and refuses to live with him without sufficient cause, and he afterwards lives in adultery, this is no cause for granting her a divorce. Foy v. Foy, 13 Ired., 90; see, also, Gray v. Gray, 15 Ala., 779. The offense of adultery consists in sexual intercourse by a married person with any one not his or her wife or husband, Helfrich v. Commonwealth, 33 Penn., 68.

A very foolish reason seems formerly to have been assigned at common law, why a divorce *a vinculo* could not be granted for adultery. It was that the spiritual court could not divorce, *a vinculo*, for any cause arising subsequent to the marriage, and in fact that they were utterly powerless as to granting such divorces, for they could only be granted for such causes as rendered the marriage void, *ab initio*, so that in fact the decree was a mere sentence of nullity. The legislature frequently wholly dissolved the conjugal union for adultery, and has often gone so far as to bastardize the issue born after a certain time prior to the passing of the act, and though it sometimes made provision for the wife, whose conduct had called forth its

In the case of three years' willful absence, it has been held, that if a husband turns his wife out of doors, and so abuses her, that she cannot live with him safely, and she * departs [*208] from him; that this is not a willful absence on her part, but that it is so on his.

In all the cases, in which the superior court in this state have jurisdiction in matters of divorce, the divorce is a *vinculo matrimonii*; and in none of them is the issue bastardized. The court, when they divorce, on account of the fault of the husband, hath power to assign to the wife forever, part of the husband's estate, not exceeding one-third, whether it is real or personal property. This is done when personal property is assigned, by making out a schedule of the property, especially; and the court decrees that such particular articles shall belong to the wife; and this decree vests in the wife an indefeasible property in such articles. If the husband's estate be in money, so that there can be no specific assignment, the court ascertain the amount of the property in the best manner they can, and then decree that the husband pay the wife such a sum, and, on failure, lay him under a penalty, which penalty will be recovered in the common law courts, and is not liable to be lessened by any decree in chancery. If sufficient personal property cannot be found, the court assigns some particular piece or pieces of real property, belonging to the husband, by metes and bounds; which assignment vests a fee simple of such lands in the wife, which no way affects the right of dower in the innocent wife. In the case of adultery, the first is given to her, for her maintenance during the life of her husband, and the latter is expressly allowed to her by statute.

action, yet where the case was of a very atrocious nature, it left her wholly at the mercy of the injured husband. See Shadwell's Divorce Bills in 1796, and Woodf. Parl. Rep., *ut supra*. In the debate upon Mr. Shadwell's bill, Lords THURLOW, LOUGHBOROUGH and GREVILLE expressed a strong desire to have the subject of divorce, *propter adulterium*, submitted to the disposition of some regular judicial court, where the crime and the provocation to commit it, could be carefully balanced and investigated with the temper, deliberation and caution that ought to accompany such a deliberation. Upon this suggestion many of the American States seem to have acted, and in several of them the libel is directly brought before the supreme judicial tribunal, which is invested with all the necessary powers to a complete and equitable investigation of all the attending circumstances.

Marriages within the Levitical degrees are prohibited by our law, and are, indeed, absolutely void; the issue of which marriages are illegitimate, without the intervention of a divorce. A divorce is never had in such a case; the statute having in express terms, rendered it impossible, that persons, related within the Levitical degrees, should * intermarry. There is [*209] one exception made by the statute: The husband may marry the sister of his deceased wife.

Whenever any other cause for a divorce, than those before mentioned, exists, application is to be made to the legislature; and it is no uncommon thing for them to divorce for cruelty, and a well grounded fear of life, limb, or some great bodily hurt. The legislature divorce *a vinculo matrimonii*, or *a mensa et thoro*, as they judge most proper. They, also, when they deem it proper, allow the wife alimony. (1)

When alimony is given to the divorced wife, it does not affect creditors; but the husband is personally liable.

When a wife is separated from her husband, on account of his cruelty, chancery will decree alimony. (a)

In England, when there is a divorce for the cause of adultery, it is only a divorce, *a mensa et thoro*; and neither the rights of the husband nor wife, as it respects property, except only such as

(a) 2 Show., 228; 2 Allyn, 96; Ga. Can., 251.

(1) The legislature, being the fountain from which issues the jurisdiction of courts to divorce for particular causes, may of course annul marriages for any cause which will induce their members to vote in favor of annulling them. In most of the states, however, the courts have so nearly an unlimited power of granting divorces, that a resort to the legislature is hardly ever necessary.

In New York, to authorize a decree for alimony, the court must be satisfied that it is necessary to establish her just rights against her husband. *Hollerman v. Hollerman*, 1 Barb., 64; *Bissell v. Bissell*, 1 Barb., 480. Where a husband files a bill against his wife to annul the marriage, upon the ground that she had another husband living at the time of her marriage with him, which is denied by the wife in her answer, she is entitled to *ad interim* alimony, and to an allowance from the complainant to enable her to defend the suit. *North v. North*, 1 Barb. Ch., 241; *Lynde v. Lynde*, 2 Ibid., 72. Questions as to the amount of alimony to be decreed, are for the court and not for the jury. But a direction to the jury to find the value of the defendant's real estate with a view to the amount of alimony, and to find what amount should be allowed, and a finding to that effect furnishes no ground for setting aside the verdict on the question of adultery. The finding on the question

is acquired by the personal services of the wife, are affected by it; and the wife shall be entitled to her dower. (a)

In Connecticut, such divorce is a *vinculo matrimonii*; and all the consequences of divorce take place, except that the issue are not bastardized; and the wife, being the innocent party, is entitled to dower. (1)

(a) Co. Lit., 53.

of alimony was mere surplussage. *Forrest v. Forrest*, 6 Duer, 102. It was held, that on a motion to make an allowance to a wife for her support during the pendency of a suit for alimony, the only proper inquiry is into the circumstances of the husband. It is the imperative duty of the court to make a provision, unless the wife be living in adultery; and evidence to other points will not be admissible on such motion. *Whitell v. Whitell*, 8 B. Mon., 50. And in Missouri, it was held that the court was not restricted to the income of the husband in decreeing alimony. *Schmidt v. Schmidt*, 26 Mia., 235. But the contrary was held in *Chenault v. Chenault*, 5 Sneed. (Tenn.), 248. Where a wife has no separate support, she is entitled to a support and to have her necessary costs paid by her husband, pending proceedings for a divorce. *Graves v. Cole*, 19 Penn., 171. And under the act of 1854, where a husband obtains a divorce from the bonds of matrimony on the ground of cruel and barbarous treatment by his wife, the court has power to decree alimony to the wife. *Shoop's Appeal*, 34 Penn., 238. But alimony is not allowed to a wife who has a separate estate sufficient for her subsistence and comfort. *Converse v. Converse*, 9 Rich. Eq. (S. C.), 535. And alimony cannot be decreed before answer. *Allen v. Allen*, Hemp. (Ark.), 58. Held, that the provision of alimony assigned to a wife may be altered by the court at any time during the separation. *Rogers v. Vines*, 6 Ired., 293. And it was held in *Hazen v. Hazen*, 19 Vt., 603, that temporary alimony would not be allowed to the wife to enable her to prepare her defense to a libel for divorce. In New York, the statute provides, that the court may require the husband to pay any sums necessary to enable the wife to carry on her defense. 3 R. S., 5th ed., p. 239.

(1) It is a settled principle in many of the states, that the wife never forfeits her dower, unless by her own act, as by an adulterous elopement, &c. In Vermont, in the case of a divorce, a *vinculo matrimonii*, the alimony granted to the wife comes in lieu of dower, and the court which annuls the marriage is invested with all the necessary powers to secure to the wife a reasonable allowance out of her husband's estate, and may even call upon the husband to disclose, on oath, what real and personal estate has come to him by the marriage, and what portion thereof still remains in his hands. Rev. Stat., Vt., 326.

A divorce will not be granted for the adultery of the wife where it was done by the procurement of the husband. *Pierce v. Pierce*, 5 Pick., 299; nor unless a legal marriage be proved. *Mangue v. Mangue*, 1 Mass. Rep., 240; nor where the libellee was insane. *Broadstreet v. Broadstreet*, 7 Mass. Rep., 474. In Vermont, if the libellee is insane, the court may, at any time during the pendency of the libel, appoint some suitable person as guardian, *ad Rem*. Stat. Vt., 325.

The testimony of neither party is admissible in an action for divorce. *Manchee*

In England, it has been holden, that, in case of a divorce, a *vinculo matrimonii*, which proceeds upon the ground that there never had been a lawful marriage; if the husband were indebted to the wife, before the divorce he is still debtor; and all the property which he received with her, belongs to the wife; yet, if this property have been by the husband conveyed, *bona fide*, to others, the rights of such third persons are not affected.

In England, where there is a divorce, a *vinculo matrimonii*, the wife cannot be endowed; for, in that country * such [*210] divorce is never had only for a cause, which rendered the marriage void, *ab initio*. But, when a divorce is granted for supervenient causes, it is a *mensa et thoro*; as a divorce for the cruelty of the husband; and in such cases the wife is entitled to dower, unless she had eloped with an adulterer. In Connecti-

ter v. Manchester, 24 Vt., 649. Under the statute of New York (2 R. S., 45), where a wife sets up, in defense to a bill for divorce, the adultery of her husband, the husband may avoid the defense by showing *condonation*. Morrell v. Morrell, 1 Barb., 318. And the question of condonation becomes in some cases an important one. It was held, that the doctrine of condonation is not applied with so much strictness to the rights of the wife as to those of the husband. "Her want of control over him, the difficulty she may find in quitting his house or withdrawing from his bed, renders it not improper that she should for a time show a patient forbearance;" and therefore condonation ought not to be implied against her from the mere fact of cohabitation, after the discovery of the husband's criminal conduct. Armstrong v. Armstrong, 32 Miss., 279. Condonation is but a forgiveness on condition of subsequent fidelity; in default of which, the rights of the injured party are revived as if there had been no condonation. S. C.

Continued cohabitation is held no bar to a divorce for personal indignities and cruel treatment. Mattocks v. Cullum, 6 Barr (Penn.), 454. Cohabitation for a single night, immediately succeeding a series of acts of cruelty by a husband towards his wife, is not such a condonation as will bar a suit by the wife for a divorce from bed and board, if the husband, by the violence of his subsequent conduct, cause reasonable apprehension in her mind that she can no longer cohabit with him without imminent danger of suffering further cruelty. Gardner v. Gardner, 2 Gray (Mass.), 434. And in Reese v. Reese, 23 Ala., 785, it was held, that if a wife still continue to live with her husband two years after a gross act of violence on his part, it will not amount to a condonation, nor estop her from subsequently complaining of it in a bill for divorce. In Missouri, in a suit for divorce by the husband against the wife for drunkenness, the wife may defend by showing the adultery of the husband, and if that fact be found, a divorce will not be granted. Ryan v. Ryan, 9 Mis., 539.

cut, the wife, in all cases of divorce, is entitled to dower, unless she is the faulty party. If she be divorced for her adultery, she cannot have dower.

A wife divorced, *a mensa et thoro*, is not entitled to administration of her husband's estate, nor to a distributary share thereof. Pre. in Can., 111. (a.)

(a) *Ld. Ray., 521, Cro. Eliz., 908.*

* CHAPTER XVII.

[*211]

OF SUNDRY SUBJECTS WHICH HAVE BEEN OMITTED IN THE PRECEDING CHAPTERS.

1. *Of Contracts by a Husband to settle on his Wife and Family his Personal Estate.*

In 5 Ves., 262, there is a case where the husband covenanted, previous to marriage, to convey all his personal estate to the use of himself and wife, for their joint lives; and after their decease, for their children. At the time of executing this covenant, the husband was possessed of £6,000. The marriage took place; and soon after the marriage, in pursuance of the articles, he assigned all his personal estate, according to the covenant contained in the articles. Soon after the assignment of his personal property he laid it out in the purchase of real estate, with a view to defeat the expectations of his wife. On the husband's death, the wife filed a bill in chancery, to have satisfaction out of the estate so purchased by the husband. The chancellor decreed, that whatever real estate had been purchased with the personal estate of the husband which he possessed at the time of executing the articles, should be conveyed by his heir to the wife.

Ought not the decree, in this case, to have been a conveyance to her for life, with remainder in fee to the children of the marriage, if there were any? See 5 Ves., 266, in notes; 3 Anst., 882. In that case, a father covenanted, on the marriage of a daughter,

that he would by will leave to her an equal share of his personal estate * with her brother and sister. With a view to [*212] elude this covenant, the father transferred, in his lifetime, to his son, a large sum in stock: reserving to himself, however, the dividends during his life. The daughter and her husband filed their bill in chancery, on the death of the father, praying for their share of the stock so transferred. This bill was rejected in the Exchequer; but upon an appeal to the House of Lords, the plaintiffs obtained a decree in their favor. The House of Lords did not deny that the father might, by an absolute gift, in his lifetime, have preferred his son to his daughter; but in this case he reserved in his own hands this stock, by taking the dividends during his life; so that, at the time of his death, he was the owner of the stock for all beneficial purposes; of course, it was bound by the covenant.

Subsequent to this decision, we find a case in 8 Ves., 150. The husband, before marriage, gave a bond to devise, convey, or assure, all the personal estate that he, during the joint lives of himself and wife, should be possessed of, to the use of himself and wife, and the survivor, charged with the payment of a sum of money to certain persons, on the death of the survivor. The marriage took effect; and with his personal property, and with a sum borrowed by him, he purchased an estate of £1,600, and laid out £600 in building thereon. The money borrowed was £1,000; but before his death, he had by payment reduced this sum to the sum of £521. On the death of the husband, the wife kept possession of the premises, and claimed them as her own. The heir-at-law brought ejectment against the widow, to recover the premises: Thereupon the widow filed her bill, praying a decree; for that in equity she was entitled to the premises. Lord ELDON decreed, that the personal estate of which the husband was possessed during their joint lives, was liable to the [*213] bond: As to the borrowed money, the wife must pay * that sum. Is it here intended, that she was to pay the whole sum borrowed, or only the £521 that was not repaid? for what was more than that, the husband was possessed of during their joint lives: for he had already paid it to the lender.

2. *Of Contracts entered into, for a Separate Maintenance.*

Upon examination, we shall find that it never has been denied, by any judge, that when a husband has contracted with a trustee for the wife, to pay a sum as a separate maintenance to the wife, he was bound so to do. This obligation was not to prejudice the creditors of the husband, or a purchaser of the husband; for equity will not enforce such contracts against them, unless the trustee has covenanted to indemnify the husband against the debts of the wife. Such contract is not only valid in equity, but also in law. 2 Vent., 217; 2 East, 282; 2 Atk., 511, 599; 10 Ves., 191. It is not necessary that there should be any covenant on the part of the trustee, to indemnify the husband against the debts of the wife, in order to enforce such contract against the husband: for if there be no creditors, the husband is bound; and if there be creditors, it will be enforced on condition that the wife pay the creditors. 2 Atk., 511.

It is a litigated question, whether a contract betwixt husband and wife, without a trustee, for a separate maintenance, is obligatory on the husband. The decision by Lord HARDWICKE, on this point, seemed to have settled the question that it was obligatory, so that equity would enforce it. See 3 Atk., 294, 547; where a letter was written by the husband to the wife's father, promising to pay her a certain sum. Lord HARDWICKE considered this as a promise to the wife, and sustained a suit in the name of the wife against the husband. See also the * case of Guth v. Guth, in 3 Bro. in Can. This is a case of a [*214] direct agreement betwixt husband and wife for a separate maintenance; and Lord ALVANLEY decreed a specific performance of the contract. Some modern cases, determined by Lord ROSLYN, have shaken this doctrine. These determinations could not rest upon the legal maxim, that a suit at law cannot be maintained on a contract betwixt husband and wife. Though it is true that such a contract cannot produce an action at law, yet it is not an uncommon thing that husband and wife are litigant parties in equity.

The ground on which Lord ROSLYN proceeded was, that the ecclesiastical courts in that country have an exclusive jurisdic-

tion of the rights and duties arising from a state of marriage. The exclusive jurisdiction of the ecclesiastical courts is admitted by him; and previous to the case of *Legard v. Johnson*, where Lord ROSLYN declared the opinion just mentioned, there was a case reported in 1 Ver., 204, where, for the same reason, the court would not sustain a suit betwixt husband and wife on a contract betwixt them. If this be indeed so, that the ecclesiastical courts have exclusive cognizance of such matters, it seems to be highly reasonable to decree as Lord ROSLYN did. But ecclesiastical courts possess no such powers in this country; and if this be the only reason why a contract for a separate maintenance betwixt husband and wife, without any trustee, should not be maintained, there is no reason existing here. If the real reason be, that contracts betwixt husband and wife, of this nature, ought not to be admitted, upon principles of policy, this equally operates against a contract with an intervening trustee. Every mischief that could arise to society in the one case, will also arise in the other. If the thing itself, to wit, the separation of husband and wife, by reason of a separate maintenance, be the great [*215] evil to be avoided, this is as effectually accomplished by an intervening trustee as if there were none. It is, in both cases, in substance, a contract betwixt husband and wife; and it would be a fraud upon the law to endeavor to accomplish, thus circuitously, by means of a trustee, what could not be done directly; and if a fraud on the law, such contract with a trustee would be void; but this is not contended to be the case by any man.

3. *Of a Parol Promise to make a Settlement in Consideration of Marriage.*

There is a well-known rule in equity, that, if an agreement be executed on one part, equity will decree an execution on the other, although that agreement was only by parol. The statute of frauds having declared that a parol agreement, in consideration of marriage, was void, a case arose in which the plaintiff, who brought a bill for the execution of such an agreement, though by parol, contended that the marriage had taken effect; that the contract, which was the consideration of the contract of settle-

ment, had been executed on the one part, and the contract to make a settlement, on the other part, was, by this means, taken out of the statute, and therefore ought, though by parol only, to be executed; praying for a decree that it should be executed. But the court decreed otherwise. So that a promise, in consideration of marriage, is manifestly an exception to the rule in chancery; for, surely, if A promise to B, if she marry him, he will settle upon her, in fee simple, Blackacre, and she marries him, the contract is executed on her part; and there is the same fraud in the husband, in such case, as in those where, it being executed on one part, the court has always decreed that it should be executed on the other.

* The true ground why the court will not take the cases of marriage settlements out of the statute, when the agreement is by parol, is mere necessity. If they should take them out, there could be no such promise which would be within the statute; for, in every marriage, the contract is executed on one part: therefore, in every parol promise to make a settlement, it must be decreed, on the footing that the contract is executed on one part. But the statute says that such promises are void; and the rule in chancery says, they shall be decreed to be performed, for they have all been executed on one part, and must therefore be executed on the other. If, therefore, the court should decree in favor of the plaintiff, it would render the statute nugatory. 1 P. Wms., 618; 3 Bro. in Can., 400; 1 Ves., 196. [*216]

If there have been any fraud practised to procure the match, and a promise is made, resting in parol, and this done with the double view of procuring the match and escaping from the fulfillment of a contract which is made and held up as an inducement to the marriage, the court will decree that such a parol agreement be executed. 2 Vern., 200; Pr. in Can., 404; 1 Ves., Jr., 177. Any practice to get up a written contract after the parties are engaged, or any practice to prevent its being executed, where there is a promise to execute one, will warrant the court to decree against the defendant, in the same manner as if there were a memorandum in writing of the contract, signed by the party to be charged therewith.

4. *Of Frauds on Third Persons in Marriage Contracts.*

In those cases where the parents or friends of the husband or wife are imposed upon in marriage settlements, by underhand [*217] agreements entered into by the husband *or wife with such parents or friends, such agreements are, in equity, considered as void, and will be decreed against. As where A, the father of C, the husband, agreed with B, the uncle of D, the wife, that he would make a certain settlement on his son, and B, the uncle, agreed to leave to D, his niece, on his death, the sum of £2,500. The settlement was made; but A took from his son an agreement, by which he was discharged from a principal part of his engagements under the settlement: this was unknown to B. The husband, wife and uncle brought their bill to be relieved from the husband's agreement; and the court set it aside, and compelled an exact fulfillment of the engagements of the father. 1 Ver., 240; 1 Salk., 156. The principle which governs in the cases of this kind is, that a fraud has been practised upon some one of the contracting parties. In the case just mentioned, a fraud was practised upon the uncle, who was, by reason of the ample settlement made by A, induced to agree to leave such a sum to his niece.

So, in the case where the wife, not having so great a portion as the husband insisted upon, prevailed upon her brother to let her have a sum of money, and gave him a bond for the payment of it. This was kept a secret from the husband; and though the husband, who was imposed on, died, and the wife died, yet the court, at the suit of her executor, relieved against her bond. The principle is most manifest. The husband was imposed upon; therefore it was void, utterly so, and could not become valid by any after events. Of a similar nature was the case where the father of the wife objected to the match, because the husband owed a sum of money; and the father of the wife would not consent to the marriage, unless the husband was set free from this debt. Thereupon, the brother of the husband gave his bond [*218] to the creditor, * and took up and canceled the husband's bond; and then, privately, took a counterbond of indemnity from the husband. The husband died; and his widow, who

contrived the fraud, to satisfy her father, applied to chancery for relief against the counterbond of her husband, and the court granted relief. The court did not grant relief because she or her husband were imposed upon; for it is apparent they were not; but because her father was imposed upon. 1 Vern., 475; id., 358. When a fraud of this kind has been practised, though the bond given in pursuance of this fraud is assigned to a *bona fide* creditor, yet it is void in his hands.

In 2 Ves., 275, there is a case decided on the same ground as those before cited were. See, also, 11 Ves., 165. The same principle also governed in a case in 1 Bro., 543, where, on a treaty of marriage, a creditor of the husband was employed to draw up a state of his affairs, to lay before the father of the wife; and the husband requested the creditor not to insert his claim. He did as requested; and afterwards stated to the agent of the wife's father that he had no claim against the husband. The husband instituted a suit in equity to prevent this creditor from recovering his demand; and the court decided against the creditor. Not because the husband, who sued, was imposed on; for the fraud was committed at the request of the husband, and for his benefit; but because it was a fraud upon the wife's father.

5. *Of Contracts entered into, the Object of which is to procure a Marriage betwixt the Promisor, or Obligor, and some other Person.*

All such contracts are viewed in equity as radically corrupt, and will be rescinded. It is not material whether * it was a male or female who made such contract. The principle [*219] on which such contracts are set aside is, that, by such means, marriages are brought about by artifice and misrepresentation, which often prove productive of grief to parents and destructive of domestic tranquillity. Such contracts were very early discountenanced in chancery. In 1 Can. Rep., 4, we find that a bond given for such a purpose was decreed to be canceled. In 1 Eq. Ca. Abr., the same doctrine is recognized. It is not necessary now, as it was once supposed to be, that the circumstances of inexperience and inequality of fortune should exist, to render such contract void. The principle on which chancery now rescinds

such contracts is, that they are of mischievous tendency; and that the consequences will, probably, be evil in all cases. See *Show.*, 8, ca. 76, where this doctrine was established by the house of lords, on a reversal of the lord keeper's decree. On the same principle, where a bond, given by the intended husband to the father of his intended wife, to give the father part of the fortune of his wife, which she had received from some relation, to use his influence to procure a match betwixt him and his daughter, was holden to be void. 2 *Vern.*, 588. Such contracts, however, have been holden valid in law. Surely it is reasonable, in such a case, that the law should be the same in both courts. If the contract ought to be set aside in chancery, because it is corrupt, opposed to sound policy, and of dangerous tendency to the community, and void, it ought, also, to be holden void in a court of law.

It is as much a maxim of a court of law, as of chancery, that a contract, opposed to sound policy, and of dangerous tendency to the community, is void. It is one of those numerous instances where courts of law have adopted a principle, and applied it to a certain class of cases, and then have refused to apply it to another [*220] class, where the reason was as strong why it should be applied, as in the case where it was so applied; whilst courts of chancery, adopting a more consistent and liberal policy, have applied it to all cases within the reach of the principle. The timidity of courts of law, and prejudices incident to technical learning, have given existence to more than half the cases to be found in our chancery reports. This is remarkably exemplified in those cases where chancery grants relief against contracts into which one of the parties did not enter freely. In such cases, if the force which induced the contract rose so high as to amount to what, in law, is denominated duress, a court of law considers such contract, so procured, as void. The principle on which the court proceeds is, that such contract was not freely entered into, and that no person ought to be bound by a contract to which he did not freely consent. But a court of law will give effect to a contract into which a man enters for fear of some great evil with which he is threatened, when it is most apparent he would have

refused compliance if he was not under some imposed hardship, if this fear be not occasioned either by duress of imprisonment or duress *per minas*; whilst a court of chancery will set them aside, because one of the contracting parties did not voluntarily consent. For the same reason that a court of law views a contract, obtained by duress, to be void, chancery approbates the principle, and extends it to all cases which fall within its reach.

6. *Of Contracts in Restraint of Marriage.*

Such contracts are void in law and equity. The principle which governs, is, that it is against sound policy, and detrimental to the interest of the commonwealth, to *restrain marriage. A contract by A, with B, to marry her, and a contract by B, with A, to marry him, and a contract by both, with each other, not to marry any other person, is not void; for here the provision of the contract is, that there shall be a marriage. If the contract by A, with B, be, that he never would marry, this would be a void contract. A contract by A with B, that he would not marry any person but her, when there is no obligation on her to marry him, is void; for, if she should refuse to marry, yet he could marry no one, unless he broke the contract. So, too, a contract not to marry, unless it should be some particular person, is void, there being no obligation on that person to marry him. So, too, although no person, by the contract, is restrained from marrying; yet, if the contract be such, that there will be a forfeiture of money, unless the obligor marries a particular person, the contract is void: for the fear of losing the money agreed to be forfeited, where the marriage did not take place, on the failure of which the forfeiture was incurred, might induce the promisor to marry such person, against his free choice. Policy requires that every marriage should be voluntary, and not to proceed from any compulsion. 2 Vern., 215; 4 Bur., 2225; 2 Vern., 102.

In 1 Atk., 287, there is a case, where Lord HARDWICKE, as appears from that report, said, that an obligation, on the part of a man, to marry a woman, within a certain time, was binding, although there was no obligation on the woman to marry him;

and there was no necessity that the promise should be reciprocal. This case is utterly opposed to every other case that I can find, and is, indeed, opposed to his own subsequent determination. 2. Atk., 538-540, and also to a case in 10 Ves., 429. I believe it is more probable that the reporter has made some mistake, as to what Lord HARDWICKE said, than that Lord HARDWICKE should have ever thus decided. So, also, a * contract, by a child (a minor is not here intended), to marry a certain person, when the parent is dead, or forfeit part of the fortune which the child shall receive from the parent, is also void; for these contracts are made, knowing that the parent disapproves of the match. It is kept secret from the parent, who is, by this means, imposed upon; and it is highly probable, that if he had known of such contract, he would have made a very different disposition of his property from what he had done. But there is, also, another reason why it is void: The promisor might be inclined to marry, rather than forfeit the fortune received from the parent; so that the marriage would not proceed from free choice, which is a matter of such importance in the view of the law, that it is preserved unhurt by the most anxious solicitude.

7. Of Legacies given in Restraint of Marriage.

It is a principle of the common law, that a condition attached to a legacy, which is in restraint of marriage, is void; and the legatee is entitled to the legacy, without fulfilling the condition. So is a legacy given, on condition the legatee never marry. The restraint, thus imposed, is void; and the legatee takes his legacy. To this there is an exception: If a man make a will, who has children, and being desirous that the children may not go into the hands of strangers for education, leaves a legacy to his wife, to be void if she marry; this legacy will be forfeited if she marry. It is thought reasonable, that, in such case, he should restrain her, as far as the loss of the legacy will influence her. See 1 Vern., 20; 1 Mod., 86; Godb., 46; 2 Vern., 388. It is also admitted that there are cases where the legacy will be void, unless the condition be * complied with, when it relates [*228] to the time of the marriage; as if a father should give a

legacy to a daughter, on condition to be void, if she married before such an age: But it must, I apprehend, be a reasonable act in the father, as if it were to be void, if she married before she was sixteen years of age. But if it were on condition that it should be void, if she married before she was twenty-five years of age, I should apprehend that the condition, only, would be void. The first might be considered by the court as a prudent act, to prevent a too early marriage; whilst the other would be considered as an unreasonable restraint. So, too, where the legacy has been given to be void, if the legatee should marry a particular person, to whom the testator had a great aversion, such legacy has been considered as forfeited, if the legatee should marry that person. However reasonable it might seem to indulge a stranger in making such a restraint, in a case where he was under no obligation to provide for the legatee, I should very much doubt of the propriety of extending this rule to all cases, where the testator was bound to provide for the legatee. If a father should give a legacy to a daughter, to be void, if she should marry J. S., a gentleman of good character, and of good standing in society; and no better reason could be assigned for such restraint, only that the testator disliked him; I should question the propriety of considering such legacy as void, if the legatee should marry J. S. And yet it might be proper for a parent to give a legacy on such condition, in a case where he was apprehensive that his daughter was in danger of marrying a dissolute, bad man, who would render her life miserable. It is also said, that the testator may restrain the legatee as to place: and if he give the legatee a legacy, to be void, if she marry at such a place. If by this, is meant that the legatee shall forfeit the legacy, if the marriage is celebrated in a certain * place, or in a certain family, it may be reasonable to de- [*224] cide such legacy to be void; but it is difficult to conceive of such a restraint, without attributing it to a whimsical disposition in the testator, the indulgence of which appears to be unnecessary. It is, I believe, settled, beyond controversy, that all restraints, to prevent the legatee from marrying a person of a particular profession or calling, are void. There is a case, where

the court declared a legacy void, because the legatee married a Papist; the legacy being, by the will, declared to be void, if she married a Papist. This might have been thought reasonable when Papists were considered as enemies to the government; always wishing to subvert the establishment then made, and to place on the throne the Pretender, who always was a Roman Catholic prince. But I should very much question, whether, such a restraint would now be deemed valid in England; and there can be no such reason existing in this country, as once existed in that, for indulging such a restraint. 1 Vern., 20.

If a legacy be given, provided the legatee marry, with the consent of some person, as her mother, guardian, or some friend, if the legatee marry without such consent, she is entitled to the legacy. It is considered as done by the testator only in *terrorem*: but if the legacy had, in such case, been given over to another, upon such legatee's marrying without consent, this second legatee will be entitled to the legacy. 1 Vern., 199; 1 Atk., 502; Pre. in Can., 565.

There is a case in Eq. Ca. Abr., thus circumstanced: The legacy was to be forfeited, if the marriage were without the consent of A and B, and, in that case, given to C. The legatee married without consent, and then obtained a subsequent consent of A and B. The court decided, that the legacy was vested in the second legatee * as soon as the first legatee married without the consent of A and B. 1 Ves., 199; [*225] 2 Show., 116; Pre. in Can., 565. It seems to have been a question, whether a restraint shall last beyond the time of minority, if there be a marrying afterwards, although there was a limitation over. As where the legacy was given to A, if she married with consent of B; if not, it was given over to C, who, at the time of the death of the testator, was young, and she lived a single woman, until after she was twenty-one years of age; she then married without the consent of B: the question was, who should take the legacy, the first, or second legatee? It is said, that it was determined, that the first should take it; upon this principle, that it was unreasonable to require the legatee to ask consent, after she arrived at full age. It seems, by the

elementary writers, to be supposed, that this point was determined in 1 Eq. Ca. Abr., 103, which case I will state: The testator devised lands to pay his debts, and also a legacy of £2,500; but, if the legatee married, without the consent of A, there was to be a deduction of £500 from the legacy; which sum was to increase the fund for payment of debts. The legatee lived until she was more than twenty-one years of age, and then married without the consent of A; and the £500 was of no consequence, as to increasing the fund for the payment of debts; because the fund, arising from the sale of the land, was abundantly sufficient to pay all debts, without any aid from the £500. The court decided, that the legatee was entitled to the whole legacy of £2,500; and the chancellor observed, in that case, that it was unreasonable that the legatee should forfeit any part of the legacy, because she married without consent, when she arrived to full age. But there was another point in this case, on which the case may have turned; for it might have been urged * that [*226] there was no limitation over of the £500; for, there being an ample fund to pay the debts, exclusive of the £500, the purpose for which it was limited over, had failed, and there was no purpose to which it could be applied, to fulfill the intention of the testator. But, I apprehend, the true construction of that provision in the will, was, that, in the event of the legatee's marrying, without consent of A, the £500 should sink into the fund, for paying debts; and, of course, would be applied as the law would apply it, if there was a residuum after debts were paid; viz., it would be in the hands of the executor, a resulting trust for the heir.

PARENT AND CHILD.

[*227]

*CHAPTER I.

INFANCY.

OF INFANTS, WHEN LIABLE ON THEIR CONTRACTS, FOR NECESSARIES; AND WHEN NOT, ALTHOUGH THE CONTRACT WAS FOR NECESSARIES. WHEN BOUND BY SECURITIES, GIVEN FOR NECESSARIES; AND WHEN NOT BOUND.

ANY person, male or female, under the age of twenty-one years, is an infant. Such persons are in a situation very different from adults, both as it respects their contracts, and their liability to punishment for crimes. (1)

Infants are not liable for their contracts, expressed or implied. (a) This is laid down as a general rule; to which there are a variety of exceptions, both in law and equity.

It is the privilege of an infant, that he may rescind his contracts at pleasure. In ordinary cases, he can avail himself of this privilege. It is not a matter of any moment, whether the contract is a fair one, or not; the infant may rescind it.

We find it laid down as an exception to this rule, as a principle of the common law, that an infant is bound by his contracts for necessaries. The articles deemed necessaries, are food, drink, washing, clothing, physic, and instruction; but an infant is not bound for these articles, unless they were necessary for him, under his circumstances. (b)

[*228] * Whenever an infant lives with, or is under the care and protection of, a parent, master, or guardian, and that

(a) 1 BL., 468, 465.

(b) 1 T. Rep., 41; 8 Id., 578; 1 BL., 468.

(1) An infant attains his majority on the day preceding the twenty first anniversary of his birth. Wells v Wells, 6 Ind., 447. The statutes of some states make the term of minority shorter.

care and protection is duly exercised, the infant is not bound by his contract for the articles called necessities. (a) (1) When an infant is out of the reach of the protecting arm of a parent, master or guardian, he is bound to pay for necessities by him received; and so, too, this may be the case where that care and protection is not duly exercised: (b) (2) The infant who lives with his parent, who furnishes him with whatever is necessary for him, can never be bound by any contract which he makes. It is not necessary that the infant should live with the parent, &c. The case is the same when he lives abroad, and his parent, &c., supplies him with necessities. But if an infant be under

(a) *Cro. Jac.*, 494.

(b) 2 *Atk.*, 85; *Peake's Rep.*, 229.

(1) *Guthrie v. Murphy*, 4 *Watts' Rep.*, 80; *Bainbridge v. Pickering*, 2 *Black Rep.*, 1325; *Hall v. Connolly*, 3 *McCord's Ch. Rep.*, 6; 2 *Kent's Com.*, 239; *Wailing v. Toll*, 9 *John. Rep.*, 131; *Kline v. L'Amoureux*, 2 *Paige's Rep.*, 419; *Angel v. McClellan*, 16 *Mass. Rep.*, 28.

And an infant is liable for money paid at his request by the plaintiff to a third person for necessities furnished him. *Swift v. Bennett*, 10 *Cush. (Mass.)*, 436; *Smith v. Oliphant*, 2 *Sandf. (Superior Ct.)*, 306.

Where an infant married, it was held, that such clothing as is usually worn on such occasions, by persons in his situation and condition in life, came under the head of necessities. *Sams v. Stockton*, 14 *B. Mon.*, 232. But a contract for the insurance of his property against loss by fire is not a contract for necessities which will bind the infant absolutely. *N. H. Ins. Co. v. Noyes*, 32 *N. H.*, 345. Nor is a contract for the board of four horses for six months, the principal use of which was in the business of hackman, although the horses were occasionally used to convey his family out to ride. *Merriam v. Cunningham*, 11 *Cush. (Mass.)*, 40.

When an infant is under the control of a master, parent or guardian, his contracts for necessities are absolutely void. *Rogers v. Hurd*, 4 *Day*, 57; *Kline v. Beebe*, 6 *Conn.*, 494.

An agreement to work seven years for board, &c., "and a horse in addition if he worked seven years," is for necessities principally, and the addition about the horse will not avoid it. *Wilhelm v. Hardman*, 13 *Md.*, 140. A husband, though an infant, is bound for necessities furnished his wife. *Oantime v. Phillips*, 5 *Harring. (Del.)*, 428. And he is also held liable for ante-nuptial debts of his wife for necessities. *Cole v. Seeley and wife*, 25 *Vt. Rep.*, 220.

In a suit for necessities, the question, whether the articles are of those classes for which an infant is bound to pay, is one of law for the court: the question, whether they were actually necessary and suitable to the condition of the infant, is one of fact for the jury. *Beeler v. Young*, 1 *Bibb*, 519; *Glover v. Ott*, 1 *McCord*, 572.

(2) *Ford v. Fothergill*, *Peake's N. P.*, 289; *Burghart v. Hall*, 4 *Mees. & Wels. Rep.*, 729; *Story v. Perry*, 4 *Carr. & Payne*, 526.

necessitous circumstances, and in want of any of the articles before mentioned, who has no parent, master, or guardian; or if he have, and be entirely out of their reach, so that they cannot afford that relief which he needs, and receives from others the relief which those articles afford him; he is bound to pay. This would be the case, when an infant was on a journey, out of the reach of his parents, and should be in necessity. We can easily conceive, that this might be the case, in a variety of instances. So, too, if the care and protection, which it is the duty of the parents to afford to the infant, be withheld; as where he is not properly clothed, to protect him from the inclemency of the weather; or where he is not allowed food in a sufficient quantity, or the food is of a bad quality, and the like; and this duty, which is incumbent upon the parent, is performed by another; the infant is bound to pay for the necessaries furnished to him. We are not to suppose that the parent is discharged from his liability to the person furnishing the necessaries for the infant. This is not the case; for, as it was his duty to have provided for the [229] minor, whenever the minor * is provided for, he has received a benefit; and the articles furnished to the infant, in the view of the law, have come to the parent's use; and the law immediately raises a promise from the parent to pay for all the necessaries furnished in such cases. The reason why the infant is made liable, is for the infant's benefit, that he may acquire relief from those about him, with more readiness than would often be the case, if there were no person to resort to for compensation, except the parent of the minor, in a distant country, with whom the person furnishing the necessaries, has no acquaintance, and in whom he places no confidence.

The articles for which an infant is bound must be not only those termed necessaries, and necessary for him under his then circumstances, but he will be bound only to the amount of their value to him, and not to the extent of his contract. (a) (1)

(a) Cro. EL., 588; Cro. Jac., 580; Latch, 169.

(1) The term necessaries is defined by Lord COKE to include victuals, clothing, medical aid, and good teaching, or instruction, whereby the infant may profit himself afterward; Co. Litt., 172, a; and by victuals are meant those necessary for his

If an infant, in want of necessary clothing, should purchase cloth for a coat, proper for him in all respects, the ordinary price of which was two dollars per yard, and contract to give three or four dollars per yard, he would be answerable for no more than two dollars per yard. (a) Or, if he should purchase clothing, altogether improper for his rank in society, he would be bound to pay no more than for clothing of this kind, i. e., such as would be suitable for him: As if a sailor-boy should buy a coat of superfine broadcloth and covered with gold-lace, and contract to pay for it no more than its real worth; yet he would be bound to pay no more, in that case, than its real value to him, which could be no more than for cloth of a much inferior value. (b) It is apparent, from this view of the subject, that the rights of the infant cannot be preserved without inquiry into the consideration of the contract, and subjecting him to no greater damage for the non-fulfillment of his contract than the value of the articles* to him. I think it would be correct to say, that an infant is not liable on the footing of any express contract; [*230] for it is certain that he is not liable to the extent of it, but is liable on the implied contract arising from his having been furnished with necessaries, the amount of damages, in every case, being regulated by the equity of the case. An infant is not bound for money lent, unless it is actually expended in necessaries; nor is he in that case, in a court of law, unless the lender himself laid it out in necessaries; but, in equity, he is bound to pay to the

(a) Poph., 151.

(b) Cro. Jac., 500.

support; for dinners and fruit supplied to an undergraduate in a university will not be included by the term. *Brooker v. Scott*, 11 Mees. & Wels., 67. So where a tradesman has oversupplied the infant's wants, though the articles might, in other respects, be considered as necessaries, the infant is only chargeable for such as are actually needed; and it is the tradesman's duty to acquaint himself with the infant's circumstances, as well as to take notice of supplies by other tradesmen. *Johnson v. Lines*, 6 Watts & Serg., 80. An infant is not personally liable for necessaries, when they are furnished on the credit of, and charged to, the guardian. *Simms v. Norris*, 5 Ala. Rep., 42. But an infant husband is liable for his wife's debts contracted before marriage. *Butler v. Brick*, 7 Metc., 164. And an infant widow is bound by her contract for the furnishing of the funeral of her husband, though he has left no property to be administered. *Chapple v. Cooper*, 13 Mees. & Wels., 252.

lender the value of the necessities, when the infant himself lays it out in necessities. (1)

In chancery, the lender of the money is considered as in the place of the vendor, and the value of the necessities will be the rule to regulate his demand. (a) It will be found that, where the minor enters into a security for the payment of a debt thus contracted, that sometimes he will be liable on the security given; at other times, not. I apprehend the principle which governs in this case is this: When the security is of such a nature that, by the rules of law, the consideration cannot be inquired into, then the infant is not liable on such security; for it is clear that the privilege of infancy cannot be protected, if he be liable; for the whole sum contracted for in the security must be paid, where no inquiry can be made into the consideration. If an infant were to be bound by a bond (for instance) given for necessities, his privilege of being bound only to the extent of the value of the necessities might be wholly destroyed; as where he purchases necessities of the value of £5 only, and gives his bond for £50, if he be liable on this bond, he is liable for £50; for no inquiry can be had as to the consideration of a bond, to show that it is in fact less than it purports to be. To preserve, therefore, entire the rights of the infant, he is not liable on the bond; (b) but the circumstance of a bond being * given will not prevent his [*281] being liable on the original contract, to the extent of its real value: And this I believe to be the true reason why an infant is not liable on a bond with penalty; for if there were no penalty, this right would be affected, as the case might be, if he were bound to pay the sum in the condition only, and that, indeed, is all that he is liable to pay, as the law now is; the court being by statute empowered to chancer down the penalty to the sum in the condition, and interest.

So, too, an infant is not bound by a negotiable note, after it is negotiated; (c) for in such cases the evidence of the want of

(a) Salk., 379; 10 Mod., 67; Pra. in Can., 87; 1 P. Wms., 583, 588; 2 Eq. Ca. Abr.

(b) Oro. EL., 920; Reptn., 164.

(c) 1 Term Rep., 41.

(1) He was held liable, also, for money paid to procure his release from arrest on execution, and also in mesne process, where the arrest was for necessities. *Randall v. Sweet*, 1 Denio, 461.

consideration is wholly inadmissible; but if the note have not been negotiated, but remains in the hands of the promisee, a recovery on this note, when given for necessities, may be had against the infant; for in this case the consideration may be inquired into. So, too, in case of a note not negotiable, the consideration may be inquired into; but by such note the infant is bound for necessities. (a) By a bill of exchange he is not bound; for the consideration cannot be inquired into.

To this doctrine it is objected that, if it were correct, an infant would not be bound by a single bill; and yet the elementary writers agree that he may be bound. The answer to this is, that, although it may now be considered as settled law that the consideration of a single bill cannot be inquired into, (b) yet this was not formerly the case, when it was settled that an infant might be bound by a single bill; and if the law respecting single bills be altered with respect to inquiring into the consideration, then it ought also to be altered respecting an infant's being bound by a single bill. (1)

(a) 1 Wood, 408; Pre. in Can., 848; Chit., 30; Amb., 161.

(b) 1 Keb., 183; Str., 232; 1 Lex., 126.

(1) The question of what acts of the infant are absolutely void, and what only voidable, is discussed at length in a subsequent chapter.

The doctrine is laid down by Lord MANSFIELD, in *Zouch v. Parsons*, 3 Burr. Rep., 1804, that all such gifts, grants or deeds made by an infant, which do not take effect by delivery of his hand, are void; but such gift, grant or deed, made by an infant by matter in deed or in writing, which take effect by delivery of his hand, are voidable. This is also the rule laid down by Perkins, sec. 12, and adhered to by the Chancellor in *Stafford v. Root*, 9 Cow., 626.

It must be admitted that some of the decisions seem to militate against the authority of *Zouch v. Parsons*. Thus it has been held that the infant's bond, though given for necessities, is void (*Baylis v. Dinely*, 3 Maule & Sel., 493), and his negotiable note given for necessities; *Swasey v. Vanderheyden*, 10 John. Rep., 33; *Trueman v. Hurst*, 1 Term Rep., 40; *McMian v. Richmond*, 6 Yerg., 1; *McCallis v. How*, 3 New Hamp., 348; though in *Everson v. Carpenter*, 17 Wend., 412, it was held to be only voidable. His acceptance of a bill of exchange is also void; *Williamson v. Watta*, 1 Camp. N. P. Rep., 552; and his contract as security for another absolutely void. *Curtin v. Patten*, 11 Serg. & Rawle, 395. All these cases proceed directly upon the ground that an infant is not liable on his express contract, but that the court will look back of the writing, and see whether there is such a consideration for it as will raise an implied promise in the absence of the express contract. It will be seen hereafter that it is greatly for the interest of the

An infant is not bound by an *insimul computasset*, even for necessities, although the consideration may be inquired into: (a) for an infant is not considered as capable of stating and settling [*282] an account; and at the time the law * was settled, that an infant was not bound by an *insimul computasset* for necessities, no inquiry could be made respecting the consideration of an *insimul computasset*. (1) (b) There is a case in Latch, 169, from which it appears, that the reason why an infant is not liable in an action of *indebitatus assumpsit* or an *insimul computasset* for necessities, (and which accords with the opinion expressed in this chapter,) is, that no evidence can be given, in such case, of the value or necessity of the items which compose the *insimul computasset*.

In the State of Connecticut, we have a statute on this subject; in the construction of which, there seems to be an opinion generally received, that the common law is altered; and that no

(a) Latch, 169; 1 T. Rep., 40; Pow., 36; Co. Litt., 173; 1 Roll., 433; Kyd., 185.

(b) Chitty, 51, 83-88; Peak. Rep., 67, 215; East., 117, 323; Latch, 169; Cro. Jac., 602; 1 T. Rep., 41.

infant that these contracts should only be considered voidable, for if absolutely void, the person contracting with him is also discharged.

The necessary conclusion from these premises is, that an infant is not bound by a negotiable note, even after it has been negotiated, and such is the doctrine of a large number of authorities. Chitty on Bills, 16, and cases there cited. But it is held that a single note given for necessities, given for the exact sum due, will bind him. *Id.* So the indorsement by an infant payee will not pass any interest in the bill against himself, though, under some circumstances, the acceptor and subsequent indorsers will be liable. Chit. on Bills, 111; Taylor v. Croker, 4 Esp. N. P. Cas., 187. Articles of apprenticeship, entered into by him, will not be binding unless sanctioned by the parent or guardian. Harvey v. Owen, 4 Blackf. Ind. Rep., 383; *contra*, Rex v. Wigston, 3 Barn. & Cress., 484. Nor will his bond and warrant of attorney. Waples v. Hastings, 3 Harr., 403. Or his agreement to marry. Pool v. Pratt, 1 D. Chip. Rep., 252. Where he has received an order in payment for services rendered, he will not be bound by the receipt of it. Abel v. Warren, 4 Vt. Rep., 149. Nor is he bound by a discharge executed by him to a witness. Walker v. Ferrin, 4 Vt. Rep., 523. But the recognizance of an infant for costs is only voidable. Patchin v. Cromach, 13 Vt. Rep., 330.

(1) Though he is not bound by an account stated, still it is not absolutely void, but only voidable, and may be ratified on his coming of age; and if he does so ratify it, an action of debt as well as *assumpsit* may be maintained thereon. Williams v. Moor, 11 Mees. & Wels., 256.

infant, who has a parent, guardian or master, can be bound by his contract, even for necessities; and that the doctrine of infants being bound only by such contract, is confined to those cases only, where the infant has neither a parent, guardian nor master. The language of the statute does not sanction such an opinion. It is a statute purely in affirmance of the common law, except that it renders the parent, liable on any contract of the infant, which he consents to. The words of the statute are, that no person who is under the government of a parent, guardian, or master, shall be capable of making any contract, or bargain; but surely, it is not a strained construction to say, that, when a minor is out of reach of the parent, &c., that he is not under his government; for that government cannot be exercised. The statute is not, that an infant, who has a parent, guardian, or master, cannot contract, in any case; but he who is under the government of a parent, guardian or master, cannot contract. If that were the case, a minor, thrown on our shores by shipwreck, would not be able to contract for necessities, if it could be shown that he had a parent, &c., living: and the common law does not, any * more than our statute, suffer an infant to be bound by his contracts for necessities, where he is [*233] under the government of a parent, &c., except in the exempt case of that government being unduly exercised, as before stated; and it would be remarkable, if our legislature meant to reject the common law on this subject, when the government of the parent, &c., was so exercised, that the minor suffered from hunger, thirst, cold and nakedness; and, in that case, that he should not have the privilege of binding himself, but must continue to suffer; for his contract for such articles would not bind his parent, if the statute is to be understood as contended for. The expressions in the statute show, that the parent, &c., are not to be bound by any contract, unless where the infant was authorized to contract. The contract of such infant is declared to be utterly void, except when allowed to be made by the parent. It follows of course, then, if the infant, who has no proper care taken of him, should contract for necessities, neither he nor his parent is bound, and he is left to perish. If the legislature intended

to have effectuated such a notable change in the common law, it would have been expressed in a manner very clear and lucid, and not left to construction. It cannot be supposed, that the statute intended to alter the common law, and leave the person, whose humanity has furnished necessaries for an infant in distress, without remedy against the minor or parent: But on the construction against which I am contending, this would be the case; for the statute exacts, that such contract never binds the infant; and the parent, only when he authorizes the contract. But if the statute be considered as an affirmation of the common law, in all contracts for necessaries, by an infant, not under the government [*234] of a parent, &c., or when that * government is not duly exercised, the infant is bound, and the parent also. It ought to be remarked, that, however convenient and useful certain articles may seem to be to an infant, under his then circumstances; yet, if the article furnished, is not one of those termed, by law, necessaries, the infant is not bound: (a) As if an infant be a farmer, and, in his business, should purchase a cart, or yoke of oxen, he is not bound by his contract: Or, if an infant merchant should contract for goods, the case would be the same.

The infant is bound for necessaries; for his wife and his children: for, by law, he is permitted to marry; and therefore, can enter into such contracts as are necessary to the existence of the relation of husband and wife. He is, also, liable for the debts of his wife, which existed at the time of coverture. (b) (1)

The necessary termed instruction, must be such as is suitable for the infant's condition in life. A liberal education at an university, may be as proper for one person, as a country school education is for another; and we find it laid down in Sid., 446, that instruction in singing and dancing, was not necessary. A change of manners may, possibly, now warrant a different decision.

(a) Ore. Jac., 494; Latch, 279; 2 Stra., 1098; 2 Salk., 196.

(b) Stra., 168; Espin. Dig., 161; Barnes' Notes, 95.

(1) Butler v. Brick, 7 Metcalf, 164.

*CHAPTER II.

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OF THE INFANT'S PRIVILEGE TO RESCIND HIS CONTRACTS. WHEN HE IS COMPELLABLE IN CHANCERY TO DO CERTAIN ACTS OR PERFORM CERTAIN DUTIES; AND OF HIS BEING BOUND, IF HE FULFILL SUCH CONTRACTS, OR PERFORM SUCH DUTIES, WITHOUT COMPUSSION; AND HOW FAR HIS PRIVILEGE EXTENDS IN SUCH CASES. OF CERTAIN CONTRACTS WHICH INFANTS MAY MAKE, AND THE EXTENT OF THEIR LIABILITY ON THOSE CONTRACTS; AS IN THE CASE OF INFANT EXECUTORS' MARRIAGE SETTLEMENT BY THEM. OF THEIR POWER TO DEVISE PERSONAL PROPERTY. OF THEIR BEING BOUND, AFTER THEY COME OF AGE, BY RATIFYING THOSE CONTRACTS WHICH WERE MADE DURING INFANCY.

THERE are certain contracts which minors are capable, at law, or chancery, to make; and, also certain acts which they are compellable to do. If they make such contracts, or perform such acts, without compulsion, they are bound by them: But it is always to be understood that, if such contract be unequal, or such act disadvantageous to the minor, he may rescind it; but it must appear to be so, or he cannot avail himself of his privilege; whereas, in ordinary cases, he rescinds his contracts at pleasure; and no inquiry is to be made whether they are fair, beneficial contracts or not. This rule may be exemplified by a variety of cases: An infant, being a joint-tenant, or tenant-in-common, or parcener with others, is compellable to make partition. If, then, such infant should make partition which is reasonable, he cannot rescind it. An infant mortgagee is compellable to reconvey, upon the mortgage-money being tendered or paid; * and if, upon the receipt of the money, he do reconvey, it is a [*238] valid conveyance.

An infant, who is a mere trustee of real estate, will be compelled in chancery to convey in all cases where a trustee, who was an adult, would be compelled to convey. (a) It is no objection that

(a) 2 Ves., 559; Com. Rep., 615; 3 Atk., 477.

the person is a *femme covert*; she will be decreed to convey by fine. (1) An infant is compellable to set out the widow's dower. (2) If, then, he do so, and it be a judicious setting out of dower, he is bound by it. So an infant trustee is compellable to give a discharge for money paid; and in these, and all cases

(1) 2 Kent's Com., 242. The power to compel him to convey by a court of equity springs from the English statute of 7 Anne, c. 19, which has been re-enacted in the State of New York. N. Y. Rev. Stat., vol. 2, p. 294. But it must be held in trust only, or he will not be compelled to convey. If the decree be to convey with a warranty, it is error. *Ewing's lease v. Higby*, 7 Ohio Rep., 198, part 1. See *Jones v. Brewer*, 18 Mass. Rep., 314.

In the matter of Hyatt, adm'r, v. Seeley, 1 Kern. (N. Y.) Rep., 52, which was an application to the Supreme Court, under a statute, to compel a specific performance by infant heirs, of a contract for the sale of land, entered into by the ancestor, and an order directing the infants to convey all their interest (the deed to be executed by Josiah S. Mitchell, their guardian *ad litem*, in the name and behalf of the infants. It was left as questionable (per SELDEN, J.) whether the heir could be required to convey, by a deed containing personal covenants, when the ancestor had contracted to convey with covenants of title.

Upon this point the court say: "If they are to be bound by covenants at all, they should, obviously, be to the same extent only as they would have been bound by the covenants of the ancestor, had the deed been executed by him—a deed which would, of course, be limited by the amount of their inheritance from the ancestor, and should be so expressed in the deed executed by the heirs."

But where the order of the court directs the infants to convey merely their interest, personal covenants inserted in the deed on their behalf are void. It was held that, as there was no order or decree of the court requiring them to execute a deed with covenants, they could make no covenants, for they clearly had no power to bind themselves, nor their guardians, by *voluntary* covenants entered into without the order and direction of the court.

The infant heir of a vendor is bound to fulfill his contract for conveyance, and may be decreed to do so, notwithstanding his minority. *Hill v. Rissegien*, 17 Hill, 162.

In *St. Clair v. Smith*, 3 Ohio Rep., 355, it was held distinctly that infants are not capable, in law, of making covenants to bind themselves, and that a court of equity has no power to decree them to do it. The jurisdiction of the court of chancery, in New York, in directing the sale of infants' estates, is derived exclusively from the statute. *Rogers v. Dill*, 6 Hill, 415. In this case, an order for the sale of an infant's contingent remainder was held to be without the jurisdiction of the court of chancery.

(2) Co Litt., 172; a. And, therefore, if he be a tenant-in-common, he may be decreed a reasonable partition. *Barrington v. Clarke*, 2 Penn. Rep., 115. And he may be decreed to charge a mortgage on a full payment of the mortgage-debt.

when he is compellable to do an act, if he do it without compulsion, he is not at liberty to rescind it. (a) (1)

So, too, an infant, at the age of seventeen, can act as an executor; (b) and his acts respecting the testator's estate are as binding upon him as on other executors, unless the act done will create a *devastavit*, and subject him to loss out of his own estate: in such case he may have his privilege. If an executor, who is an adult, should discharge a debt due to the estate, without having received the money, yet he would be answerable, for the debts were assets in his hands; and he would be without any remedy, having discharged the debt. The case of the infant executor would be different: he would, indeed, be answerable for the debt, as assets, but he would not be bound by his discharge; for, if he were bound, it would create a *devastavit*: But if he had received the debts, his discharge would be as binding upon him as upon an executor who was an adult. Cro. Car., 490; 2 Bur., 1027; Moore, 177, 852; Co. Litt., 172.

An infant can enter into the contract of marriage, the male at fourteen, and the female at twelve; and such contract, if celebrated according to the usual ceremonies, is, indisputably, a valid marriage. If celebrated before that period, it may be receded from by either party; but * needs no renewed celebration if the parties, after they arrive at that age, cohabit together as man and wife. (2) [*237]

(a) 3 Bur., 1801; Co. Litt., 172.

(b) 3 Bur., 1794.

(1) The doctrine of the common law clearly is, that he may act as executor. Toll on Ex., 31; Off. Ex., 214; 2 Bl. Com., 563. But it is questionable how far this doctrine is adopted in the United States. In Vermont, when he is named executor, administration with the will annexed will be granted, during his minority unless there shall be a co-executor who shall accept the trust and give bond. R. S., Vt., 1839, p. 260. In New York, also, he is declared incapable of acting either as administrator or executor. 2 Rev. Stat., N. Y., p. 69. And such is believed to be the law of Massachusetts, Rhode Island, and Missouri. In Maryland, he may act as executor at the age of eighteen. But he is not liable for a *devastavit*. 2 Kent's Com., 242.

(2) This subject has been fully discussed in a former chapter. The provisions of the common law, establishing the age of consent at 14 in males and 12 in females, have not been adopted in all the United States. For the ages of consent, as established by courts, or legislative enactments, in the several States, see ante, note to marginal page 200.

That minors may marry, by the English law, before they are capable of consent, is indisputable. They may, indeed, when they become capable of assenting and dissenting, dissent to the marriage, and render it invalid; but until that time arrives, they may legally intermarry. This is a singular case, that marriage should take effect, without a contract between the parties; for there can be no contract, where there is no capacity to contract. In 1 Roll. Abr., 341, there is a case, where a wife, being only eleven years of age, did then disagree to the marriage; and the husband, being then of the age of consent, married another woman, and by her had a child. Such child was adjudged to be a bastard, because the former marriage continued valid; for, the first wife, when she dissented to the marriage, had not arrived to the age when she could dissent. A marriage at such a tender age, has not been heard of in Connecticut, I believe; and I cannot suppose, that such marriage would be considered valid. In consequence of this power in infants to contract, marriage settlements, that have been made by infants, when reasonable, have, in chancery, been held valid; being considered as accessory to the principal contract. The truth, is, in these cases, the chancellor is considered as guardian to all the infants in the kingdom; and takes such care of them as his discretion dictates, free from the control of the common law. To ascertain, with precision, in what cases the chancellor enforces marriage settlements, by infants, so as to form a general rule, I find impossible. That they have done it, in a variety of instances, is certain. I will refer the reader to the cases on the subject, which I have examined, and leave him to form his own conclusions. The estate of a female infant was bound by a marriage settlement, as [*238] appears * from the case of *Seys and Pierce*, reported in 3. Atk., 316.

The same doctrine is mentioned in 2 Vern., 501. (a) The agreement of a female infant was inferred from circumstances, and she was bound; but in all these cases, the settlement must be with consent of the parent and guardian. The power of infants to consent to marriage, is under the like restrictions. Their consent is not valid, without the consent of parents. It must like

(a) 8 Mod., 101.

wise, be remarked, that such settlements, by infants, will not bind them, unless they are perfectly fair and reasonable. In every case, where there is an inadequacy, a court of chancery will refuse to sanction them. The point, that a female infant is bound by her covenant, in equity, to settle her estate, where there is a competent provision made for her by her husband, and her parents have consented to such covenant, seems to be settled in a case reported in 2 P. Wms., 243.

That a female infant may bar her dower, by accepting a jointure, is indisputable. (a) It would seem, from the above statement of authorities, that it might be fairly concluded, that the point was settled, that a female infant, under the restrictions before mentioned, would be bound by an agreement made before marriage to settle her estate. There is, however, some doubt thrown upon this subject, (b) from the opinion of Lord HARDWICKE, in 3 Atk., 613, where he says, that the case in 2 P. Wms., 243, is going a great way; and is still involved in greater obscurity, by the opinion of Lord THURLOW, where he says that the real estate of a female infant is not bound by her agreement, unless she take possession of the jointure, after her husband's death, and then ratifies it by her own act; (c) and that it is immaterial whether the provision for her that induced the settlement, is competent or not. (1)

(a) Bro. Par. Ca., 510; Ves., 55.

(b) 3 Atk., 613.

(c) 3 Bro. in Can.

(1) Whether a female infant can bind her property by an ante-nuptial settlement, may be pronounced, upon very high authority, an unsettled question. 2 Kent's Com., 243. The cases of *Slocombe v. Glubb*, 2 Brown, 545; *Strickland v. Croker*, 2 Cas. in Chan., 211; and *Warburton v. Lytton*, cited in 4 Bro., 440, are authorities to sustain such a settlement. But in *Drury v. Drury*, 1 Eden's Rep., 39, it was held that, notwithstanding a jointure was settled upon an infant, she might elect to waive her jointure and take her dower; while in *McCartee v. Teller*, 2 Paige's Rep., 511, it was held that a legal jointure settled on an infant was a good bar of dower. *Milner v. Lord Harewood*, 18 Ves., 259, is another strong authority against the validity of settlements made by female infants. It was there held that she was not bound by her agreement to settle her real estate upon marriage, if she did not, when of age, choose to ratify it; and that nothing but her own act after the period of majority could fetter or affect it. The cases of *Cape v. Adams*, 1 Desaus., 567; *Tubb v. Archer*, and *Randolph v. Randolph*, 3 Hen. & Munf., 399, support the opposite doctrine.

[*289] * Whether a male infant would be bound by his marriage settlement, seems to be more uncertain; but I cannot conceive of any imaginable reason why he should not be bound in all cases where a female infant is. (1.)

I find that in the case of *Lavender v. Blackstone*, cited in *Roberts on Fraudulent Conveyances*, that a promise, made by an infant, on his marriage, to settle his estate on his wife, when of age, was a sufficient consideration to support the settlement after marriage. There is a case in *Pre. in Can.* where a male infant covenanted with his intended wife, who was an adult, that her estate should be settled in a certain manner; and he was bound by this covenant.

It has been decided, that a male infant's lease for life binds him; yet, it is said by *Powell*, that there is no decision of chancery, that a male infant can bind his real estate, by marriage settlements. (a)

An infant can dispose of his personal property by will, though at what age the infant shall possess this power, seems uncertain. Some have said, that at twelve in females, and fourteen in males: Others have said, generally, that when an infant arrives to fifteen years of age, such infant may dispose of personal property by will. (b) Others have fixed on seventeen years of age as the proper time. If the civil law governs, which, I think, is probable, seventeen years is the true time. If, then, an infant make a will of his personal property, at this age, and in such will direct his debts to be paid, his executor is a trustee for the payment of debts contracted by the testator during his infancy; for these debts, so given, are so many legacies to the debtors, by the testator. (c) (2)

(a) *Fondh.*, 68, 70.

(b) 3 *Ver.*, 409, 104; 2 *Mod.*, 318; *Pre. in Can.*, 316; 1 *Bl.*, 468.

(c) *Com. Dig.*, 2.

(1) See *Atherton on Marriage Settlements*, 42, 45.

(2) Such was the doctrine of the common law. 2 *Black. Com.*, 497. *Arnold v. Earle*, *Rep. temp.*, see vol. II, p. 529. But it has become the subject of statute regulation in several of the states. In Vermont, the power of an infant to make a valid will is taken away, and none but a person of full age, and sound mind, can make a valid testamentary disposition of his property. *Rev. Stat. of Vt.*, 1839, p. 354. In Virginia, the required age is eighteen; in New York, eighteen in males,

In Connecticut, this is regulated by statute; and a minor must be at the age of seventeen, before he can dispose of his personal property.

* At common law, an infant can elect a guardian at fourteen years of age, if a male; if a female, at the age of [*240] twelve years. (a)

Although a minor is not bound by his contract; yet, if he promise to fulfill it, after he arrives at full age, he is bound (1);

(a) *Fondb.*, 74; *Ch. Rep.*, 55; 1 *Eq. Ca.*, Abr., 323; 1 *T. Rep.*, 648; 3 *Vent.*, 203; 1 *Str.*, 690.

and sixteen in females; in Massachusetts and Connecticut, eighteen. *Rev. Code of Virginia*, 224; *N. Y. Rev. Stat.*, vol. II, p. 60; *Rev. Stat. Mass.*, 1835; *Stat. Conn.*, 1821.

(1) It has been questioned whether, in the case of a voidable contract, it is not necessary for the infant, on attaining his majority, to signify his avoidance of it. *Holmes v. Blogg*, 8 *Taunt.*, 35. But the established doctrine now is, that a voidable contract only becomes binding on the infant when, on attaining his majority, he does some act amounting to a ratification or affirmance of it. *Evelyn v. Chiochester*, 3 *Burr. Rep.*, 1717; *Hubbard v. Cummings*, 1 *Greenl. Rep.*, 11. In South Carolina it is held, that a simple declaration of the infant, on coming of age, is not a sufficient confirmation of his voidable contract, unless accompanied with some act which recognizes the validity of the obligation. *Ordinary v. Wherry*, 1 *Baylies' Rep.*, 28.

A new promise, made by an infant after he becomes of full age, must possess all the ingredients of a complete agreement, to enable a creditor to recover. *Hodges v. Hant*, 22 *Barb.*, 150; *Conklin v. Ogden*, 7 *Ind.*, 553.

A bare acknowledgment of a debt was held sufficient to take it out of the statute of limitations, though to make the contract binding there must be a promise to pay. *Wilcox v. Roath*, 12 *Conn.*, 550. But in Pennsylvania it was held, that a promise, after coming of age, to pay "as fast as he got able," did not take the case out of the statute of limitations, and would not support an action without proof of ability to pay. *Chandler v. Glover's Adm'r*, 32 *Penn.*, 509. See, also, *Thomkins v. Brown*, 1 *Denio (N. Y.)*, 247; *Everson v. Carpenter*, 17 *Wend.*, 419.

In Vermont, all contracts, whether executed or not, if not for necessities, may be avoided by him, unless he has affirmed them after arriving at full age. *Abell v. Warren*, 4 *Vt. Rep.*, 149. But all contracts, merely voidable, will bind him after becoming of full age, unless he disaffirm them within a reasonable time thereafter. *Richardson v. Boright*, 9 *Vt. R.*, 368. The same principle is also recognized in *Bigelow v. Kinney*, 3 *Vt. Rep.*, 353. In Pennsylvania, some distinct act on the part of the infant in affirmance of an executory contract, after becoming of full age, is necessary to bind him. *Curtin v. Patton*, 11 *Serg. & Rawle*, 305; *M'Ginn v. Shaeffer*, 7 *Watts' Rep.*, 412. Such, also, is the doctrine in Massachusetts. *Oliver v. Houdlet*, 13 *Mass.*, 237; *Baker v. Lovett*, 6 *Mass.*, 78; *Boston Bank v. Chamberlain*, 15 *Mass.*, 220; *Whitney v. Datch*, 14 *ibid.*, 457. The doctrine of the common

and it is to be remarked, that a suit against him, in such cases, is not brought upon the new promise, but on the original contract, or security; and if to such suit, there be a plea of infancy, the force of this plea is avoided, by setting out in the replication the new promise. This rule, now laid down, is applicable to all

law is the same which obtains in New Hampshire and South Carolina. *Robbins v. Eaton*, 10 N. H. Rep., 561; *Aldrich v. Grimes*, *ibid.*, 184; *Hoyt v. Underhill*, *ibid.*, 220; *Rainsford v. Rainsford*, 1 Spears' Eq. Rep., 385; *Williams v. Moor*, 11 Mass. & Wels., 256.

The proper course undoubtedly is for the infant to give notice of his disaffirmance, in all cases, where he does not intend to stand by his contract, for his confirmation might possibly be inferred against him after he had been of age a reasonable time, either from positive acts in favor of the contract, or from his tacit assent under circumstances not to excuse his silence.

As to what acts will constitute a disaffirmance, in the case of a deed, it was held, that an entry, suit or action, or subsequent conveyance, was such. *Drake v. Ramsey*, 5 Ohio Rep., 251; *Breckenridge v. Ormsby*, 1 J. J. Marsh., 252.

It was held, in New York, that before suit can be brought by an individual to recover possession of lands conveyed by him during infancy, he must make an entry on the lands, and execute a second deed to a third person, or give notice of his intention not to be bound by the first deed, or do some other act of equal notoriety in disaffirmance of it. *Voorhies v. Voorhies*, 24 Barb., 150. He may disaffirm the deed by a conveyance to another person on arriving at full age. *Pitcher v. Laycock*, 7 Ind., 398; *Peterson v. Laik*, 24 Mia. (3 Jones), 541. And it was held, also, in *Pitcher v. Laycock*, *supra*, that it is not requisite to such disaffirmance, that he first restore the purchase-money. By the statute of 1845, in Maine, a satisfaction of a contract by a person on coming of age, must be in writing to bind him. *Thurlow v. Gilmore*, 40 Maine, 378. A mortgage executed by an infant, like other executed contracts of infants, is valid until some act is done by him to avoid it: And held, also, that the subsequent execution of a deed of the mortgaged premises to a third person, without referring to the mortgage, will not amount to a ratification of the mortgage. *Palmer v. Miller*, 25 Barb., 399.

It has been held that, mere acquiescence for years, afforded no proof of a ratification, in the case of the conveyance of real estate by the infant. There must be a positive act for that purpose, after the infant becomes of age. *Boody v. Kinney*, 10 Shep., 517. And, though, lapse of time might furnish evidence of acquiescence, it would not deprive the infant of the right to avoid, until the statute of limitations took effect. *Drake v. Ramsey*, 6 Ohio Rep., 251.

The enjoyment of any benefit, profit or privilege, under a contract, after attaining full age, will have the effect to confirm it. *Wheaton v. East*, 5 Yerg., 41; *Gillett v. Stanley*, 1 Hill, 121; *Phillips v. Green*, 5 Munroe, 344; and the act of avoidance must take place after the infant has become of age. *Bool v. Abix*, 17 Wend., 119.

It was held, in the case of *Jones v. The Phoenix Bank*, 4 Seld. (N. Y.) Rep., 234, that, when a person, during his minority, submitted a claim to arbitration

cases where the original contract, or the security for such contract, is voidable; only, if the security be void, the suit cannot be founded on that; but resort must be had to the original contract, if that be valid. If the original contract be void, no suit can be maintained; but if a suit can be maintained in such case, it must be brought on the new promise; and he is bound only to the extent of the new promise, in any case: As, for instance,

and on an award being made in his favor, and paid to his guardian, his receiving the money, after he became of age, is an affirmance of the submission, and will bar the claim.

The Court, in this case, recognize the doctrine of *Delano v. Blake*, 11 Wend., 85, which was a case of acquiescence, by neglect. The plaintiff, an infant, in that case, received a note in part payment for his labor. He kept the note eight months after he became of age, and then tendered it back to the defendant, and demanded payment for his work, the maker of the note having become insolvent. The Court held that, the retaining of the note by the infant, after he became of age, for that length of time, was a ratification of the contract, and he could not recover for his work.

In the case of *Bostwick v. Atkins*, 3 Comst., 53, it was held that, where a sale was made beneficial to the ward, at which he was present, and who, instead of repudiating it, suffered eighteen years to elapse after he became of age, without impeaching the conveyance, during which time the title had passed into the hands of innocent parties, that, he must be deemed to have affirmed the sale.

To render a subsequent conveyance by an infant, after he becomes of age, an act of dissent to the prior deed, it must be so inconsistent with it, that both deeds cannot properly stand together. *Eagle Fire Ins. Co. v. Lent*, 6 Paige, 635.

In an action for calls on railway shares, defendant pleaded infancy at the time the shares were granted, and at the respective times of making the calls. Held, on general demurrer, that the plea was bad for want of an averment, that the defendant had repudiated the contract, or that he continued a minor. *The North Western Railway Co. v. McMichael*, 5 Ex., 114.

It was held, in *Lessee of Tucker v. Moreland*, 10 Peters, 59, that an infant may avoid his deed or contract in different ways. He may avoid it by matter *in pais*, as of a feoffment and entry by the infant; and by plea, as in the case of a bond; and again, by suit, as where he disaffirms a contract made for the sale of his chattels, and sues for the chattels; sometimes by a writ of error, as where he has levied a fine during his nonage; sometimes by a writ of *audita querela*, as where he has acknowledged a recognizance, statute, staple or merchant; sometimes, as in case of the alienation of his estate, by a writ of entry, *dum fuit infra aetatem*, after his arrival at age. *Lessee of Tucker v. Moreland*, 10 Peters, 59.

A married woman who is a minor, and who joined in a mortgage of her real estate, may, in a suit to foreclose, plead infancy during her minority. *Schneider v. Stalhr*, 20 Mis. (5 Bennett), 169.

when the promise is to pay one-half of the original debt, only one-half can be recovered. (a)

So, too, if an infant lease lands, and, after he come of age, receive rent, this is equivalent to an express promise, that the lease shall stand; and the infant is bound thereby: and so, too, if the infant were the lessee, and, after he comes of full age, pays the rent, this is an affirmance of the lease; and he cannot, afterwards, rescind it. (b) The rule is, if the infant, after he comes of age, waives his privilege, by words or acts, he confirms the contract.

There is a case in 3 Atk., 84, to this effect; where an infant, when at school, purchased liquors; and when he came of age, he gave his note for them in the sum at which the seller sold them: the seller never producing any account, the court directed the note to be given up. This seems to be extending the privilege of infancy * beyond its natural limits; for in ordinary cases, when an infant comes of age, and promises to fulfill a contract made during his minority, he is bound so to do. It is true, the non-production of the account might afford evidence of fraud in the seller; but it is not such a fraud as, in ordinary cases, chancery would relieve against, where a person is as competent to take care of himself, as any adult is supposed to be.

There are to be found a variety of cases in books, where infants have been held, in chancery, bound by their contracts, by which they have received to themselves great advantage; and if they were not bound, a fraud would be practised upon them. This is exemplified in the case of an infant, who, when his father was about to make a settlement of part of his real estate upon a younger son; to prevent it, promised his father that if he would not make such settlement, and would suffer the estate to descend to him, he would pay his younger brother £100. The father, relying on the engagement of his eldest son, desisted from the intended settlement. In this case, chancery compelled the infant to pay the £100.

In the case of an infant devisee, to whom lands were devised, charged with the payment of portions to the other children of

(a) Esp. Dig., 164.

(b) Stra., 696; 2 Vent., 308; 3 Id., 58; Cro. Jac., 820.

the devisor, and the infant offered other lands for the security of the portion, which proposal was accepted by the guardians of the children; the devisee shall be bound by his offer, unless he retract it immediately upon his coming of age. (a) The real ground on which this interference of the chancellor takes place, is, that an infant ought not to reap any benefit from his fraud; and that, in point of equity, he is as much obliged to abide the consequences of practising fraud, as if he were an adult. (1)

* It is said, that, in a court of law, an infant is not liable for his fraud in a contract. An attentive consideration to [*242] this subject, which I will endeavor to bestow in its proper place, I flatter myself will lead us to conclude, that such a rule is opposed to principle; and notwithstanding the decisions on this subject, yet the opinion of some eminent and profound lawyers will warrant us now to consider it *questio vexata*, open to discussion. Instances are to be found, which did not relate to marriage settlements, where courts of chancery have decreed infants to fulfill contracts, when found to be beneficial to them (b) No rule

(a) 1 Fend., 70, 71; 9 Mod., 38; 2 Eq. Ca. Ab., 439; 1 Br. in Can., 359.

(b) 1 Eq. Ca. Ab., 297.

(1) The privileges extended by the law to infants, are intended for their protection solely, and not to be used as means of oppression against those with whom they may have dealings. They are, therefore, bound by their contracts, to the extent of the consideration they have received; and when they avoid their executed contracts, on becoming of full age, they must restore the consideration which they have received. *Hamblett v. Hamblett*, 6 N. H. Rep., 339; *Badger v. Phinney*, 15 Mass. Rep., 359; *Roof v. Stafford*, 7 Cow. Rep., 179. Thus, where he obtained goods upon the false representation that he was of age, he was suffered to avoid payment upon plea of infancy; but the vendor was held entitled to reclaim the goods as having never parted with his property in them. *Badger v. Phinney*, *sup.* And there is a distinction made between executory and executed contracts, as in the case of *Craighead v. Wells*, 21 Mis. (6 Bennett), 404, where it was held, that, in an action for a breach of contract to labor for the plaintiff a given time in California in consideration of an outfit furnished by the plaintiff, the plea of infancy was a valid one, although there had been no offer to restore the cost of the outfit. It was held in Vermont, that in a suit by an infant for the consideration of a contract avoided by him, he must show a return of the property sold to him, if it remains in his possession, but its entire consumption or great deterioration by him is no defence to the action. *Price v. Furman* 1 Williams (Vt. Rep.), 268. But held, in Kentucky, that an infant cannot rescind a contract and bring an action to

can be laid down, in such cases, to what extent chancery will go. The chancellor seems to act as guardian of the infant, and to exercise an authority not strictly compatible with the general principles of law. (1)

recover the value of the property parted with, without restoring to the other party the value with which he parted. *Bailey v. Barnberger*, 11 B. Mon., 113. So if he receive a deed of land, and execute a mortgage to secure the purchase-money, he cannot avoid the mortgage and affirm the deed. *Richardson v. Boright*, 9 Vt. Rep., 368.

Whether an infant can, during minority, bring a bill in equity to rescind a purchase of chattels, and for a return of the notes and chattel mortgage given by him to secure the purchase-money, may be doubtful; but if he can, and he relies on fraud of the defendant, practised by reason of the plaintiff's tender age, the burden of proving this is upon him, and the terms of the rescission will be, that the plaintiff return the property and pay the defendant such sums as equal the deterioration in the property caused by the plaintiff's use. *Gray v. Leasington*, 2 Bosw. (N. Y. Superior Court), 257.

A minor has a right to avoid a special agreement entered into for personal services and not for necessities, and recover a reasonable compensation for the work which he did, after allowing for any injury which the plaintiff sustained by the avoidance of the contract. *Lowe v. Sinklear*, 27 Mis. (6 Jones), 308. But in *Whitemarsh v. Hall*, 3 Denio (N. Y.), 375, it was held, that, if an infant contract for a certain time and abandon it, he may, by his next friend, recover the actual value of his labor; and the employer can claim no damages by way of recoupment for the avoidance of the contract. An infant, who receives property under a contract of sale to him, and then surrenders it to the seller, intending to give up all his interest in it, cannot afterwards avoid such surrender and retake the property from the possession of the seller. *Edgerton v. Wolfe*, 6 Gray (Mass.), 453.

An infant contracted with an adult for the sale of a horse and harness; for which the adult gave him two promissory notes, besides something else of little consequence. The infant warranted the horse to be kind and gentle, which proved to be a false and fraudulent warranty. Afterwards the infant brought his action on the two notes. The defendant set up in defense the fraudulent warranty, and consequent failure of consideration: in avoidance of which the plaintiff plead his infancy. Held, that, the action brought, affirmed the entire contract, and infancy could not be pleaded to a part of it. *Morrill v. Aden*, 19 Vt., 505.

In an action upon a judgment against an infant, the defendant cannot set up his infancy in defense. *Ludwick v. Fair*, 7 Ired., 422.

(1) See Chap. V, Part II, and notes.

*CHAPTER III.

[*243]

OF ADULTS BEING BOUND BY THEIR CONTRACTS WITH INFANTS. OF THE EFFECT OF AN INFANT'S AVAILING HIMSELF OF HIS PRIVILEGE, AFTER HAVING RECEIVED OF THE ADULT THE CONSIDERATION FOR WHICH THE INFANT ENTERED INTO THE CONTRACT. WHETHER, DURING INFANCY, HE CAN RENDER VALID HIS CONTRACT, SO THAT HE CANNOT AFTERWARDS AVOID IT.

ALTHOUGH infants are not bound by their contracts with others, yet adults are bound by their contracts with them. (a) If A, an infant, should lease his land to B, an adult, for rent, it is no answer in the mouth of B to say, that A was not bound by his lease, and could have rescinded it at pleasure; and that A not being bound to him, he, B, ought not to be bound to A, for that there was no reciprocity in such a contract. (1) So, too, it has always been held, where A, an adult, promises B, an infant, to marry her, that A was bound; although the only consideration for A's promise was B's promise to marry him, and by that promise B was not bound. (b) This doctrine is only applicable to such contracts of a minor as are voidable; for, if the contract be void, there is no reciprocity, nor any consideration for the contract of the adult; (c) and he would not be bound by his contract with the infant: But, in such cases, if the minor refuse to fulfill his contract, the adult is discharged from his contract with him:

(a) 1 Mod., 27; 1 Vent., 51; 1 Sid., 446, 41; 3 Mod., 248; Cro. Jac., 502.
(b) Stra., 287. (c) 9 Vin., 213.

(1) *Warwick v. Bruce*, 2 Maule & Selw., 205; *Brown v. Caldwell*, 10 Serg. & Rawle, 114; *Oliver v. Houdlet*, 13 Mass., 237; *Nightingale v. Witherington*, 15 id., 272.

A promise of marriage, between an infant and an adult, is binding on the adult, but not on the infant. *Warwick v. Cooper*, 5 Sneed (Tenn.), 659.

The rule that the adult is bound, though the infant may rescind, is well-established and recognized throughout the United States. Infancy is a personal privilege, and a contract between an infant and an adult is binding upon the latter. *Voorhies v. Wait*, 3 Green, 343; *Rose v. Daniel*, 3 Brev., 438.

As if an infant lessor should forbid the adult to improve the land leased, or turn him off the premises, having rescinded the contract; (a) everything is placed in *statu quo*, where it was before the contract was entered into. I *apprehend that it is not [*244] a disputable question; but that, so long as such contract remains executory, if the infant actually use his privilege to rescind it, the adult is not bound to perform his part. But it seems to have been an opinion among the elementary writers, that, if a contract be performed by the adult to the infant, and then the infant refuse to perform his part, and this contract be rescinded, that in such cases the adult has no remedy to recover the consideration paid to the minor. So that if a minor should contract to pay an adult fifty dollars for a horse, sold to him by the adult, and then the minor should rescind the contract, that the adult must lose his horse: Or, if a minor should buy a horse, and pay for him, that he might rescind the contract, and recover back the money, and yet retain the horse; it being a presumption of law, as they say, that the consideration paid, or delivered, by the adult, was intended as a present to the minor. This doctrine appears to me to be wholly destitute of principle, and not supported by the authorities. That the minor has a right to rescind his contract at pleasure, is not contended; but when rescinded, I should suppose that the contract was as if it had never been, and that the minor could never retain the consideration which he had rescinded. I apprehend it to be a sound maxim, and which is founded in the highest reason, that an infant, although he may always use his privilege, as a shield to defend himself against his own contracts, yet he shall never make use of it as an offensive weapon to injure others. (1) It is enough that an infant shall have full power to set afloat his contract. In doing this, he is in the proper use of his privilege; but to obtain, by that means, property from others, is a fraud, and is turning his privilege into an offensive weapon, which the law will not indulge. It is true that the lawful exercise of this privi-

(a) *Str.*, 597; *Cro. Car.*, 308; *id.*, 306.

(1) 2 *Kent's Com.*, 240.

lege will produce the effect of defrauding others, in many* cases: As where an infant has bought a horse, and given [*245] his note for the value, and then avoids his note by a plea of infancy, and has sold the horse, spent the money received, and is unable to pay the value of the horse: in this case, the adult may be defrauded; but it is because the minor is unable to pay or make him satisfaction. But how, in point of principle and good sense, would the case be, if the infant were in possession of the horse, at the time he avoided the note? Would not the whole contract be utterly void, and as much blotted out of existence as if it had never been? and would not the horse then be the property of the adult, the infant having received the full benefit of his privilege, that is, the privilege of not being bound by his contract? And if the property of the horse were in the adult, he might retake him, in a peaceable manner, prescribed by law; and might demand him of the infant; and, in the case of a refusal, might bring an action of trover against the minor, for converting the horse to his own use. (1) But it may be worth inquiry, what is to be done, where the adult bought the property of the minor, and paid him the money, and the minor rescinds the contract, and reclaims this property: how is the adult to recover the consideration paid? In this case, we are met with a technical difficulty, to recover pounds, shillings and pence; for no form of action is appropriate to the recovery of money where the consideration has failed, except only an *indebitatus assumpsit*, for money had and received; and that a minor is not bound by *assumpsit*, though he is liable for a tort. I do not admit the soundness of the rule, that the minor is, in no case, liable in an action of *indebitatus assumpsit*, for money had and received. It is true, he is not liable in any case where the action is really founded on a contract; but where it results from a set of facts which are *tortious*, or where the detainer is wrongful, there being no con-

(1) In Pennsylvania, it is said that trover will not lie in such a case. Certainly not if the fact of his infancy is known to the vendor, though detinue will lie against him for goods delivered upon a special contract, for a specific purpose, after the contract was avoided. *Penrose v. Curren*, 3 Rawle's Rep., 453.

tract respecting * the matter in existence, it is otherwise. [*246] This may be illustrated by supposing a minor, by wrong, obtains possession of his neighbor's horse, and sells him for fifty dollars: in this case, trespass and trover lies; and as the minor is liable for the tort, and as that is the gist of the action, I entertain no doubts but the tort may be waived, and an action brought for fifty dollars against the minor. There is, in this case, nothing to be proved, to entitle the plaintiff to recover, except only a tort; and there can be no satisfactory reason assigned why, for a tort, he should not be as liable in one form of action as in another.

So, if a minor had found money, the detention of it would be wrong; and I have no doubt but that an *indebitatus assumpsit*, founded upon this wrongful detention, might be supported against a minor. So, too, in the case under discussion, the minor having obtained the money through the intervention of a contract, when that contract is rescinded it places the parties, as to their right, in the same situation as if there had never been a contract; and, in that case, the money must be considered as procured by wrong, and detained by wrong; and, of course, according to this opinion, no valid objection lies against recovering the money in the form of an *indebitatus assumpsit*, for money had and received. From the cases determined, I can find nothing satisfactory on this subject. It is said, in one or two authorities, that, when the adult knew that the person of whom he purchased was a minor, that he shall not recover; for the presumption is, that he meant to make a present of the purchase-money to the infant. It is proper to remark, in this place, that those cases do not reach the case where the adult did not know that the person with whom he was contracting was a minor; but, in the case of the adult's knowing him to be a minor, the reason given, that the presumption was [*247] that the adult intended a present to * the minor, is wholly void of common sense. The facts prove that no such thing was intended; for, if he had meant to make a present to the minor, he would not have taken away the horse.

The case in 1 Sid., 129, which is cited for the purpose of establishing the doctrine that no action will lie against a minor for goods delivered to him on a contract which the minor has

rescinded, proves nothing more than this: If the adult who delivered the goods to him knew that he was a minor, he shall have no action against the minor. But it is so far from supporting the general proposition, that it is an authority to the contrary; for the judges declare that, if the goods were delivered to the infant not knowing him to be an infant, the law will be otherwise.

It ought to be remembered, that the opinion in the case given by the court, had no connection with the case before the court; and there was no necessity to have given any opinion thereon.

The case in 1 Lev., 109, cited for the same purpose, has no bearing on the point: It is a case in which it was determined, that no action lay against an infant for fraud in a contract.

The cases in 1 Keb., 905, 913, which are cited for the same purpose, have no relation to this question. They are authorities to prove, that an infant is not liable for a fraudulent affirmation, respecting a contract. Nothing more can be learnt from any *dictum* of any judge, than that an adult, who trades with an infant, knowing him to be an infant, shall never recover of him for the money, or any other article, which he has let the infant have; although the infant should rescind the contract. There is no equity in such a principle: it seems more like a penalty, inflicted for trading with an infant, than doing justice betwixt the parties. Upon general principles, * nothing can be more apparent, [*248] than that, if a minor rescind his contract, and recover of the adult, for the property received, on the contract, unless he refunds what he received by virtue of the contract, that he holds it *mala fide*.

I apprehend, that it is enough that an infant should enjoy the privilege of rescinding his contract, when he does not use this privilege for the purpose of defrauding. I should suppose that it was a much more rational rule, that an infant should never rescind a fair contract, where he had availed himself of the consideration received of the adult, than that he should be indulged in retaining the consideration, and the articles, also, for which that consideration was given. (1)

(1) The doctrine contended for, by the learned author in the text, appears to have been fully sustained by the latter authorities. In the case of *Farr v. Sumner*, 12

I do not pretend that the current of authorities will warrant this doctrine; yet I am unable to reconcile all the cases with

Vt., 28, where an infant purchased and took possession of property, and in part payment thereof, delivered other property, and without disaffirmance, brought his action of trover, to recover the property so delivered, the Court held that, having had the benefit of the consideration, and not having restored the same, he could not recover. Such was the doctrine of *Holmes v. Blogg*, 8 Taunt. R., 508; *Boody v. McKinney*, 10 Shap., 517. In cases where property has been delivered by the adult (the contract executed on his part), and the infant has promised to pay for the same, but refuses, it has been held that, the property could be reached by an action, setting up a *torious* withholding, or detention of the property. *Fitts v. Hall*, 9 N. H. R., 441.

In such case, if the infant had disposed of the property, the adult would appear to be remediless in the premises. *Fitts v. Hall*, 9 N. H., 441; *Boody v. McKinney*, 10 Shap., 517.

And in the case of *Weed v. Beebe*, 21 Vt., 495, it was held that, if an infant purchase land, and execute notes for the purchase-money, or a mortgage of the land to secure the purchase-money, he cannot disaffirm the notes and mortgage, and claim the land under the deed. The Court declare it to be well settled, in this State, that, an infant cannot avoid that part of his contract which binds him, without also avoiding that part which is in his favor.

Where an infant executed a mortgage to secure the purchase-money of goods, it was held that, after he became of full age, he was at liberty to affirm or disaffirm the mortgage. If he affirmed it, he must pay the amount, or deliver the goods, according to its tenor. If he disaffirmed the mortgage, he must restore the goods, or account for their value. He cannot affirm the sale, and at the same time repudiate the mortgage. *Ottman v. Moak*, 3 Sandf. Ch. Rep., 431.

Where a party, on arriving at age, claims the restoration of property parted with while a minor, he must restore, on his part, what he may have received. *Hillyer v. Bennett*, 3 Edw. Ch. Rep., 222.

And further, it appears that, even in the case of a lease, which is disadvantageous to him, the infant cannot protect himself, if he has taken possession, and has not disclaimed; at all events, unless he still continues a minor. *The North-Western Railway Company v. McMichael*, 5 Ex., 114.

The right of infants to avoid their contracts, both as it respects real estate and personal property, and the consequences resulting therefrom, were fully considered in the case of *Price v. Furman*, 27 Vt., 268. It was held to be a matter of indifference, whether the contract was advantageous, or not, to the infant, as it respects his right to rescind the same.

The Court adopt the doctrine of *Stafford v. Roof*, 9 Conn., 26, and *Boal v. Mix*, 17 Wend., 120, that, in the case of the sale of land, the infant may enter and take the profits, and hold the same, but cannot conclusively avoid a conveyance until he is of age.

The Court do not postpone this right to avoid the contract to full age, when it

being good law, upon any other hypothesis; (a) particularly, the case in *Cro. Jac.*, and in *Bulstrode*, where it is held, that, if an

(a) *Cro. Jac.*, 22; 2 *Bulst.*, 62.

relates to personal property. Their language is: "But contracts relating to personal property, may be avoided under age, and immediately, and in many, if not most cases, must be rescinded during that period, in order to afford the infant that protection, which it has been the policy of the law to create in his behalf," citing *Stafford v. Roof*, 9 Conn., 626; *Boyl v. Mix*, 17 Wend., 120; *Shipman v. Horton*, 17 Conn., 481; *Willis v. Twombly*, 13 Mass., 204; 1 Am. Lead. Cas., 259.

This right to rescind the contract, the infant possesses, both when the contract has been executed on his part, and while it remains executory as to him. In the case of executory contracts, the Court say: "If the action is brought against the infant, he may interpose his nonage as a defense, and no recovery can be had against him, whether the action be assumpsit or in case in form *ex delicto*," and cite *Morrill v. Aden*, 19 Vt., 505; *Jennings v. Randall*, 8 T. R., 335.

In the case of an executed contract, more difficulties, it would appear, arise. The Court, in *Price v. Furman*, 27 Vt., 271, refer to the case of *Holmes v. Blogg*, 8 Taunt., 508, in which it was held that, an infant who had paid money as a premium for a lease, and held under the same, for a period during infancy, but who, after becoming of age, avoided it, could not recover the sum so paid; and deny the doctrine there laid down, as well as that, of the cases of *McCoy v. Hoffman*, 8 Conn., 84, and *Weeks v. Leighton*, 5 N. H., 343, which appear to have been decided upon the authority of the former case of *Holmes v. Blogg*, 8 Taunt., 508.

The case of *McCoy v. Hoffman*, is treated, by the Court, in *Price v. Furman*, as expressly overruled by the case of *Midbury v. Watrous*, 7 Hill, 110, and the case of *Holmes v. Blogg*, virtually overruled by the case of *Carpe v. Overton*, 10 Bing., 252.

On the contrary, the Court in *Price v. Furman*, hold it to be the well-settled doctrine now, that, when a contract is avoided by an infant, he may recover back whatever he has paid or delivered upon it. The Court say: "If services have been rendered, he may recover in *quantum meruit*, the value that, his services have been, as it shall appear upon the whole state of the case; if money or property has been paid or delivered, it can equally be recovered," citing *Moses v. Stevens*, 2 Pick., 332; *Veret v. Osgood*, 19 Pick., 572; *Voornies v. Wait*, 3 Green, 343; *Judkins v. Walker*, 17 Maine, 38; *Whitmarsh v. Hall*, 3 Denio, 373.

The Court concur with the cases of *Hillyer v. Bennett*, 3 Edw. Ch., 222, and *Kitchen v. Lee*, 11 Paige, 107, in the general rule that, in case the infant rescinds his contract, and thus avoids his liability upon the same, he must surrender the consideration, and return what he has received; but proceed to note an important qualification to which it is subject. The Court say: "A distinction is to be observed between the case of an infant in the possession of such property, after age, and where he has lost, sold or destroyed the property during his minority. In the former case, if he has put the property out of his power, he has ratified, the contract, and rendered it obligatory upon him; in the latter case, the property is to be restored. & #

infant lease land and improve it, until rent-day, if the rent be a reasonable rent, he will be liable in an action of debt for the rent. Here is a case where the infant is made liable, not for necessities; for a lease of land is not necessary for an infant; and I cannot perceive any possible ground, on which he is held liable to pay the rent, except this; that he has availed himself of the benefit of the lease. I know it has been said, that this decision is incompatible with the law that admits an infant to rescind his contract. I apprehend this case is in perfect harmony with that doctrine. There is no doubt that the infant might have waived his term, if he had chosen to have done so; but having received the full benefit of the lease, he shall not have the privilege of using it for the purpose of fraud, and refuse to pay the rent;

be in his possession and control. If the property is not in his hands, nor under his control, that obligation ceases. To say that, an infant cannot recover back his property, which he has parted with, under such circumstances, because, by his indiscretion, he has spent, consumed, or injured that which he has received, would be making his want of discretion the means of binding him to all his improvident contracts, and deprive him of that protection which the law designed to secure to him. The authorities, we think, fully sustain this qualification of the rule." The Court cite: *Fitts v. Hall*, 9 N. H., 441; *Robbins v. Eaton*, 10 N. H., 553; *Boody v. McKinney*, 23 Maine, 517, 525, 526; 1 Am. Lead. Cases, 260, and notes.

The facts in the case of *Price v. Furman*, were these: The plaintiff, a minor, gave to the defendant, an adult, a harness and five dollars, for a mare. After a few weeks, plaintiff returned the mare, and demanded the harness and five dollars. Defendant refused to deliver either, whereupon, plaintiff turned the mare into the road, and brought trover for the harness and five dollars.

The defendant offered to prove that, the mare was worth more than the harness and five dollars, intrinsically, and particularly so to the plaintiff, that it was a beneficial trade to the plaintiff, and in all respects, fair; also, that said mare was worth less than half what she was when plaintiff received her. This evidence was excluded.

The Court remark, upon this part of the case, that, upon the general principles stated, having offered to return the mare, being in his possession, and under his control, the right to recover the harness and money, must be considered as unaffected by the circumstance that the mare was not in as good condition as when received by plaintiff, or of equal value.

Under a similar state of circumstances to those which occurred in *Price v. Furman*, it was held, that the infant must return the property (a horse), in as good condition as when he received him, in order to rescind the contract, and recover the consideration exchanged for him. *Bartholomew v. Finnemore*, 17 Barb., 428. See note to marginal page 241, *ante*.

or, if more rent had been reserved than the land was worth, he might have avoided it, at least as to the * surplus of a *quantum valebat*. It ought to have been remarked, that [*249] when an infant enters into a contract which is void, a promise, when of age, to fulfill it, will not bind him; but a promise to fulfill a voidable contract, after the minor comes of age, binds him; and the suit must be brought on the original contract. (a) If the instrument be voidable only, the action is to be brought on such instrument; but in such cases, he is only bound to the extent of the new contract. If D, a minor, execute his note for \$50, for an article, and, when of age, promise that, in consideration of this debt, he will pay \$80, no more can be recovered. (1)

It is impossible for an infant to confirm and render valid, during his minority, any contract made by him, either by express words or any act done by him. The elementary writers seem to suppose that there is an exception to the rule: for an infant, although he has not performed, on his part, what he was to do, may, during his minority, sue and recover of the adult who contracted with him, for a non-performance of his part of the contract. This they say shows, that by this act, he elected to validate the contract on his part, and this shall bind him; for they suppose, that, unless this is so, there is no existing consideration to the

(a) Esp. Dig., 164.

(1) The general principle is thus stated by Chancellor KENT, 2 K. Com., 240: If an infant pays money on his contract, and enjoys the benefit of it, and then avoids it when he comes of age, he cannot recover back the consideration paid. On the other hand, if he avoids an executed contract, on the ground of infancy, he must restore the consideration which he has received: and this proceeds upon the only equitable ground. An infant who contracts to work for an adult by the month, and who does work a portion of the time, and receives articles on account of his labor, cannot retain the property so received, and at the same time recover the value of his services: but the value of the articles received will be allowed against him, at what they are reasonably worth, without reference to any contract made by him. Taft v. Pike, 14 Vt. Rep., 403. Whenever the person was known to the other contracting party, to be under age, such party contracts with him at his peril, and trover, for the articles delivered as a consideration, will not lie against the infant. Penrose v. Curren, 4 Rawle's Rep., 453. In a case where an adult would be liable to an action, either in form *ex delicto*, or *ex contractu*, as for instance, in an action for fraud in the sale of personal chattels, an infant cannot be made liable by bringing the action in case, instead of assumpsit. West v. Moore, 14 Vt. Rep., 447.

contract by which the adult could be bound. I apprehend, that an infant can, in no case, during his minority, validate a contract, which was not binding upon him, when he entered into it; but the true principle is, that a voidable contract of an infant, is a sufficient consideration to bind an adult to the performance of his contract. Until it is avoided, it can never be known that it will be avoided; and until it is, it is an existing contract.

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* CHAPTER IV.

WHAT CONTRACTS, WHEN EXECUTED BY INFANTS, ARE VOID, AND WHAT ARE VOIDABLE. WHAT INSTRUMENTS EXECUTED BY THEM, ARE VOID, AND WHAT ARE VOIDABLE. OF EXECUTED CONTRACTS TO THEM BEING VOIDABLE ONLY. WHETHER A PENAL BOND, EXECUTED BY AN INFANT, IS VOID OR VOIDABLE ONLY. OF THE EXECUTORY CONTRACT OF AN INFANT, IS IT VOID, OR VOIDABLE? OF THE PRIVILEGE OF THE INFANT TO TREAT HIS EXECUTORY CONTRACT AS VOID. WHEN MAY HE DO THIS? OF A JUDICIAL CONVEYANCE BY HIM, BY FINE OR RECOVERY. OF THE PRIVILEGE OF AN INFANT DEFENDANT, AGAINST WHOM A DECREE IS PASSED IN CHANCERY.

THE contracts of infants are void, and voidable. I apprehend the only correct doctrine on this subject, is, that all contracts executed as gifts, grants, &c., by a minor, which do take effect by manual delivery only, are voidable; but, in such case, if the minor cannot have the full benefit of his privilege, unless the contract is considered as void, it shall be so considered. (a) (1)

If a minor make a feoffment, this has been always held voidable only; for it passed by delivery. (b) In that case, if the

(a) 3 Bur., 1304; Latch, 10; 1 Roll. Abr., 700; Lit. Lec., 259.

(b) 3 Bur., 1304; Pow. on Cont., 34; 6 Co., 48; Fendb., 694.

(1) No satisfactory general rule has yet been laid down, by which to determine whether the contract of an infant is voidable only, or absolutely void. Mr. Bing

feoffee had entered, he could not be sued as a trespasser. If an infant sells a horse, and delivers him, he cannot treat the vendee as a trespasser for taking him. If he wishes to rescind this voidable contract, he must notify the vendee that he rescinds the

ham, in his treatise on the law of Infancy, p. 23, is of opinion that acts which are capable of being legally ratified, are voidable, and acts which are incapable of being legally ratified, are absolutely void. But this definition has not been adopted in the subsequent cases. A power of attorney is the instance usually selected in the books, of a contract absolutely void on the part of the infant; and yet there would seem to be no obstacle to the legal ratification of a power of attorney by an infant after arriving at full age; and why would not the ratification relate back to and render valid, all acts done under it prior to its ratification? One rule, however, laid down by Lord MANSFIELD, in the case of *Zouch v. Parsons*, 3 Burr., 1794, and adopted by Ch. J. PARKER, in *Whitney v. Dutch*, 14 Mass., 462, may be considered certain so far as it extends. Whenever the act done, may be for the benefit of the infant, it shall not be considered void; but he shall have his election when he becomes of age, to affirm or avoid it. But when we come to the application of even this rule to particular cases, it will be found surrounded with difficulties.

When it is for his benefit—as for necessaries, it is good; but when it is of an uncertain nature, as to benefit or prejudice, it is voidable only, at the election of the infant. *McMinn v. Richmonds*, 6 Yerger, 9; *Lessee of Tucker v. Moreland*, 10 Peters, 59. And in *Eagle Fire Ins. Co. v. Lent*, 6 Paige, 635, it was held that, the deed of an infant, purporting to be founded upon a valuable consideration, was not absolutely void, but merely voidable.

It was held, that all contracts made by infants against their interests are void, and all with the semblance of advantage voidable only. *Maples v. Wrightman*, 4 Conn., 376.

Whatever may be the rule as to executory contracts, it is clear that, the executed contract of an infant is voidable only, and only the infant or his legal representative, can avoid it. *Lester v. Fraser's Admr.*, 2 Hill, 540.

"The tendency of modern decisions," says Bennet, E. H., (the learned editor of Bingham on Infancy,) "and the opinion of elementary writers, is to hold *all* an infant's contracts only voidable, and susceptible of ratification or disaffirmance as he may elect," citing 2 Kent's Com., 236; Story on Contracts, sec. 38, 1st ed.

In case of a decree of foreclosure, obtained against an infant, it was held that, where a decree of foreclosure has been made against the defendants, subsequently discovered to be infants, the Court will not rehear the cause, nor expedite the foreclosure of their equity of redemption; but a supplemental suit must be filed, or another suit instituted. *Searen v. Nicholson*, 19 Law & Eq. Rep., 436.

A decree against infants, foreclosing a mortgage, which is rendered, without giving a day after their becoming of age, to show cause, against the decree, and without appointing a guardian *ad litem* for them, or taking the bill as confessed against them, will not for, such irregularities, be made void. *Smith v. Bradley*, 6 Smedes and Marsh., 485. A decree for the sale of mortgaged premises, instead of technical do. &

contract, and demand his horse; and if the horse be not delivered, he may then sue the vendee in trover; for the contract is [*251] void. But, in such case, if the infant found that the vendee * was about to escape out of the reach of legal process, and he could not have the benefit of his privilege, unless he sued him immediately, and arrested him in an action as a tortfeasor, he shall have liberty so to do. (a) If a minor sell a horse, and do not deliver him, and the vendee takes him, he is a trespasser; for such contract is void, there having been no delivery. All instruments which by delivery, pass an interest in property, I apprehend, are voidable. Thus deeds and leases of land are voidable; but, if the nature of the instrument delivered, be not such as to pass an interest, then the instrument is void: As a power of attorney by an infant, is void; for, by the delivery of the power of attorney, no conveyance of any property is made, only a power given to another to do it. 1 H. Bl., 75; 3 Bur., 1808.

In all these cases, where the infant is the grantee, devisee, &c., the contract is voidable only: for it is a rule, that such contracts, in which there is an apparent benefit to the infant, are only

(a) 1 Roll. Abr., 738; Latch, 10; Hob., 77; 1 Roll. Abr., 720.

closure, is binding on an infant, though no day be given to show cause against it. Id. An infant defendant can, after he comes of age, only avoid against him, by showing errors in the decree; he cannot re-investigate the subject matter, nor can he redeem mortgaged premises which have been sold. Ibid.

A mortgage by an infant *feme covert* to secure the debt of her husband is absolutely void, as against her interest. *Chandler v. McKinney*, 6 Mich., 217. A deed executed jointly by husband and wife is not void as to her, though executed during her minority, but only voidable. *Webb v. Hall*, 35 Maine, 386. And a suit by husband and wife, to recover land which she had conveyed when an infant, is a disaffirmance of the conveyance. Ibid.

When an infant is under the control of his parent or guardian, his contracts for necessities are absolutely void. *Rogers v. Hurd*, 4 Day, 57; *Kline v. Beebe*, 6 Conn., 494.

Infancy is no defense to a bond executed by an infant pursuant to the statute (1 R. S., 825, sec. 14), to indemnify the town against the expenses of supporting his bastard child. The statute, by requiring the bond, gives him capacity to bind himself by it. Consequently such contract is neither void, nor voidable. *People v. Moore*, 4 Denio, 518. It was held, that partial payment made by one of full age, upon an account commencing before and terminating after the debtor's majority, are to be applied, without special appropriation, in discharge of the earliest items. *Thurlow v. Gilmore*, 40 Maine, 378. See note to page 378.

voidable; and this is always the case where there is a grant, devise, or promise to the minor. So the power of attorney to a minor to accept seisin, is voidable. (a)

I find a rule on this subject, that contracts by a minor, in which there is no semblance of benefit, are void, notwithstanding all the declarations of this kind found in the elementary writers, and the *dicta* of eminent judges. (b) I do apprehend that this position is untenable: we find it laid down, in accordance with this rule, that a lease of an infant, in which no rent is reserved, is void. I have seen no judicial decision to support this position. Littleton declares, that a lease by an infant is only voidable: he lays this down without any exception. Lord MANSFIELD's opinion is opposed to this rule. He says that an infant may make a lease, without reserving rent to try his title; but I apprehend it is decisive of the question, that * a lessee [*252] of an infant can never take advantage of the minority of the infant lessor; yet he could, if his lease be void. (c) It is true in this case, as in all others, if the infant could not have the full benefit of his privilege, unless his lease is considered as void, it shall be so considered. (d) As if a lease should be made by an infant, of such a nature as the law inflicts a penalty for making the lease, the infant may treat it as void; and, of course, he will not be subject to the penalty. See a case in 1 Roll. Abr., where, because the infant could not have the full benefit of his privilege, unless his act was considered as void, the court adjudged it void. We find it laid down, in illustration of this rule, which I am opposing, that a penal bond is void. I know of no decision to warrant this. It is said that a penalty can never be of any advantage to a minor; and, therefore, it is void. It is inconceivable to me how a penal bond can be of any greater injury to an infant, than any other contract. He can rescind it at pleasure, as easily as any other contract; and when given for necessities, no action can be maintained upon it, for reasons which have been already mentioned. Neither do I find any judicial decision which establishes such a rule. There are decisions in

(a) 2 Vent., 206; Co. Lit., 228; Cro. Jac., 220; 3 Bur., 1208.

(b) 3 Bur., 1206; Moore, 78; 1 Lev., 6.

(c) Co. Lit., 530; Lit. Lec., 547.

(d) 9 Vin., 208; 2 T. Rep., 61; 3 Bur., 1206; Fendb., 74.

chancery, that most clearly evince that a penal bond is not considered in that court as void. Whenever an infant has directed in his will that his debts should be paid, the court will order a penal bond, given by the infant, to be paid. The court considers the request in the will as a ratification of the debt. This could not be the case, if the bond were void; for whatever instrument is void, is incapable of ratification as an executory agreement. (a) (1)

(a) 1 Fendb., 74; 1 Wood., 408; Bq. Ca. Abr., 238.

(1) Scarcely any questions, relating to the law of infancy, are so difficult of absolute determination, as whether the contracts of infants are binding, voidable, or absolutely void. As has already been observed, no general rule has been laid down which can be said to be clearly supported by a balance of authority. Below may be found a few instances in which this question has been discussed in different courts, and the different determinations it has received. Few questions can be found upon which the decisions have been more conflicting. In *Zouch v. Parsons*, 3 Burr., 1794, an infant's conveyance by lease and release was held to be voidable only. This decision is condemned, in unmeasured terms, by a writer of high authority. 1 Pres. on Abs. of Tit., 324. In *Swasey v. Vanderheyden*, 10 John. Rep., 33; *M'Mian v. Richmond*, 6 Yerger's Rep., 1; and *Trueman v. Hurst*, 1 Term Rep., 40, the promissory note of an infant is said to be absolutely void; while in *Goodell v. Myers*, 3 Wend. Rep., 479; *Everson v. Carpenter*, 17 do., 419; and *Dubose v. Wheddon*, 4 M'Cord's Rep., 221, it is held to be only voidable. In *Baylis v. Dinely*, 3 Maul. & Selw., his bond, with a penalty, is said to be void; and in *Conroe v. Birdsell*, 1 John. Cas., 127, it is held to be voidable.

Another rule was laid down by Lord Ch. J. EYRE, in *Keane v. Boycott*, 2 H. Black. Rep., 511, which has since received the confirmation of Chancellor KENT and Mr. Justice STONY. 2 Kent's Com., 236; 1 Mason's Rep., 32. It is, that when the court can pronounce the contract to be for the benefit of the infant, as for necessities, it is good; when for his prejudice, it is void; and when the contract was of an uncertain nature as to benefit or prejudice, it is voidable only at the election of the infant. We have collected a few cases illustrative of the law on this subject in several of the states, and from them we leave the lawyer to form his own conclusions.

In Ohio, the deed of an infant may be disaffirmed, at any time, before an action of ejectment would be barred by the statute of limitations. *Drake v. Ramsey*, 5 Ohio Rep., 251. His letters of attorney, conveying no present interest, are absolutely null. *Lawrence v. M'Arter*, 10 Ohio Rep., 37.

In Massachusetts, all sales to infants, made by persons of full age, are not void, but voidable, only, by the infant, and cannot be avoided by the vendors, for they have the semblance of benefit to the infant. *Bigelow's Digest*, 402.

In Vermont, all contracts made by an infant, whether executed or not, if not for necessities, may be avoided by him, unless confirmed after arriving at full age.

I would notice the rule of pleading by an infant, when sued upon a bond. He cannot plead *non est factum*, as a *femme covert* can to a bond, which she gave whilst married; but must plead his infancy specially. (a) The rule * against which [*253] I have contended, I think, must be rejected, as not well founded; remembering, however, that the infant may treat any contract of his as void, if he cannot have the full benefit of his privilege, without treating it thus.

There is a case reported in 2 Lev., 144, and 1 Salk., 279, that, in an action of *assumpsit*, infancy need not be pleaded; but might be given in evidence, under the general issue; for, say the court, an infant's promise is absolutely void. That infancy, in such case, may be given in evidence is, doubtless, correct; but the reason assigned by the court, why it may, is not the true reason. The promises of infants have, in many cases, been ratified by a promise to fulfill them, after they have arrived to full age. This would be impossible, if they were absolutely void. The reason why infancy may be given in evidence, under the general issue, is the same as in cases of usury, duress, &c., which may be given in evidence under the general issue. The action of *assumpsit*

(a) 3 Burr., 1804; 5 Co., 119; Salk., 27.

Abell v. Warren, 4 Vt. Rep., 149. Though it is said in a later case that he will be bound by his contract, unless he disaffirm it within a reasonable time after becoming of age. Richardson v. Boright, 9 Vt. Rep., 368.

In Pennsylvania, the executory contract of an infant is voidable as to him, but binding upon the adult with whom he contracts. M'Ginn v. Shaeffer, 7 Watts' Rep., 414.

In South Carolina, the agreement of an infant to a partition of lands, is voidable, and will require some distinct act on the part of the infant, after becoming of age, to make it binding. Rainsford v. Rainsford, 1 Spears' Eq. Rep., 385.

In New Hampshire, where an infant had purchased land, and gone into possession of it during infancy, it was held that he might avoid the purchase, but that a remaining in possession, and offering to sell the land, after he became of age, amounted to a sufficient ratification of the contract. Robbins v. Eaton, 10 N. H. Rep., 184.

The deed of an infant is voidable, not void. Bool v. Mix, 17 Wend., 119; Eagle Fire Ins. Co. v. Lent, 6 Paige, 635. An infant promises parol authority to another to transfer the note by indorsement for him is good, and the act of indorsement is voidable and not void. Hardy v. Waters, 23 Maine (3 Heath), 450. See notes to marginal page, 250.

came in lieu of the action of debt; and *non assumpsit* is, in substance, the same as *nil debet*, in debt; i. e., there is nothing due. Whatever shows that nothing is due, may be given in evidence, under the general issue.

To prove that the acts of an infant are void, 3 Mod., 310, is cited; where it was determined, that a rent-charge out of his land was absolutely void. Opposed to this, is a case in *B. R. Hudson v. Jones*, where it was held, that such a grant by an infant was not void, but voidable only.

There is a case in *Dalt.*, 64, that if a minor sell or lease for years, and, when of age, receives part of the money, yet he may avoid the contract; and the court say the contract was void, and it cannot be made good. This case is opposed to all the cases of leases by minors, and receipt of rent after they came of age, [*254] by which the * leases were validated. It is opposed to the case in 2 Vern., 235, where it was holden, if an infant exchange lands, and remain in possession after he comes of age, he is bound by the exchange.

The truth is this: Purchases by an infant are voidable. Conveyances are voidable, only when they take effect by delivery; but if the infant's privilege will not be sufficiently protected by considering them as voidable, they are void. This is illustrated by a case in *Keble*, 369, where a barber contracted with an infant for the hair growing on her head; and, in pursuance of the contract, with the license of the infant, cut all the hair from her head; it is apparent that no way was left to her to avail herself of her privilege, without considering the contract as void. She, accordingly, brought an action against him for a trespass in forcibly cutting off the hair from her head, and recovered. Executory contracts are all voidable only; and I would here remark, that bonds, with conditions to perform collateral acts, are voidable only. (a) There is, then, no contract executed, or executory, but what is voidable only, if the contract has taken effect by delivery, except in cases of delegated powers. (1)

(a) 3 Bur., 1307; 1 Bl., 579; 1 Vent., 51; 1 Roll. Abr., 730; 1 Lev., 17.

(1) See note, marginal, page 252.

It is a universal rule, that all executory contracts, which are voidable, on the ground of infancy, may be avoided during infancy by the infant, as well as afterwards; as when a minor promises to pay, &c. So, too, in all contracts respecting property which are executed by delivery of some article, on payment of money, may be rescinded by the minor, both before and after the time of his coming of age. But conveyances of real property by feoffment, on delivery of the deed, which comes in lieu of payment, or by any other conveyance of such property, in fee, for life, or years, cannot be avoided before the infant attain to full age. Suppose that a minor should take possession of the estate conveyed by him, * for the purpose of rescinding [*255] his contract, and then convey to a stranger; the original grantee will hold against the second, unless the infant avoids the first grant, after he comes of age; for his title is the eldest; and the infant, when he comes of age, may avoid or confirm, which he chooses; for his entry upon the first grantee is an act as avoidable as his grant was. (a) Where the conveyance is by fine or recovery, which is a judicial conveyance, he may avoid it by writ of error; but this must be done during minority, and cannot be done afterwards. The reason is, during minority, the age is determined by the court, by inspection of the court; but, after full age, infancy or not, when the conveyance is made, it must be tried by the jury, and nothing can be averred against the record; which implies that the conveyance must have been made at full age, or he could not have suffered a common recovery, whilst a minor. The whole of this doctrine is an infringement of the principles which govern the law of infancy, though they may seem to be preserved by technical reasoning. No such practice obtains in the State of Connecticut; nor have I learnt that there is any such in any of the States in the Union.

The acknowledgment of a statute, or recognizance, by a minor, is not void, but voidable; and must be avoided by an *audita querela*, during minority; for infancy, in this case, is tried by inspection. Moore, 206; Co. Litt., 380.

If an infant will avail himself of his infancy, when sued on a

(a) Co. Litt., 248, 380; Term Rep., 161; 3 Bur., 1794, 1808; 2 Rep., 123; 3 Mod. 214.

contract, he must plead his infancy, and cannot be discharged of course, as is the case with a *femme covert*; his contract was not void. (a) (1) An infant defendant, against whom a decree in chancery has been made, is bound by it only by the rules of that court: he has six months to impeach the decree for fraud or error. But an infant plaintiff is as much bound by a decree as [*256] an adult, (b) unless *his guardian, or *prochein ami*, was guilty of fraud. 2 Vern., 342. Where we find that, when there has been a decree in chancery against an infant, there must be a *subpoena* served upon him within six months after he comes of age, to show cause, if any he has, why the decree shall not be established. (2) When lands are devised to be sold for the payment of debts, the heir, being an infant, has no day given to him to show cause against a decree to sell them, unless it is decreed that he join in the sale. Pra. Can., 185. (3)

(a) 1 Bos. & Pul., 480; 3 Salk., 531; 3 Id., 625; 1 Ver., 286.

(b) 3 Atk., 625; 1 Fendb., 75.

(1) It is laid down by Mr. Chitty, that, in an action of assumpsit, infancy need not be specially pleaded, but may be given in evidence under the general issue; 1 Chit. Pl., 417; though he says it is most advisable to plead it specially. Id., 421. See, also, *Wailing v. Toll*, 9 John. R., 141; *Stansbury v. Marks*, 4 Dall., 130; *Vase v. Smith*, 6 Cranch, 231. But the infancy of the plaintiff must be taken advantage of, by a plea in abatement. *Schermerhorn v. Jenkins*, 7 John. Rep., 373.

(2) *Thomas v. Gyles*, 2 Vern. Rep., 232; *Jackson v. Turner*, 5 Leigh's Rep., 119; *Miller v. Dennis*, 3 John. Ch. Rep., 367; *Kellsal v. Kellsal*, 3 Mylne & Keene, 409; *Powys v. Mansfield*, 6 Simons' R., 637.

(3) *Scholesfield v. Healfield*, 7 Simons, 667. In cases of a strict foreclosure of the mortgagee's right, without a sale, the infant has his day after he becomes of age, but is then strictly confined to showing errors in the decree. *Williamson v. Gordon*, 19 Ves., 114.

* CHAPTER V.

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OF THE LIABILITY OF INFANTS FOR CRIMES, AND CIVILITER FOR TORTS. OF HIS LIABILITY FOR FRAUD IN A CONTRACT.

MINORS are supposed to want discretion; and when they are of such tender years that they can have no regular exercise of will, they cannot commit any crime against society. (a) And it is a universal rule that infants, who have not arrived to seven years of age, cannot be punished as criminals; for they have no will that can concur with a forbidden act, in contemplation of law.

It is also a universal rule that, when they have arrived at the age of fourteen, they are as capable of committing crimes as adults. The period betwixt seven and fourteen is an uncertain period. If the infant be *doli capax*, he is liable to punishment; if he is not *doli capax*, he is not liable. 4 Bl. Com., 28, 337. The presumption is in favor of the infant; and the *onus probandi* devolves on the prosecution. (1) Infants, of any age, are privi-

(a) 1 Hawk., 1; Flow., 19.

(1) An infant between the ages of seven and fourteen is, *prima facie*, incapable of committing a crime; but if, after allowing due consideration to his age, and to the additional fact that he is a slave, the evidence convinces the jury, beyond a reasonable doubt, that he fully knew the nature and consequences of his act, and plainly showed intelligent design and malice in its execution, he may be convicted of murder. *Godfrey v. State*, 31 Ala., 323.

In the case of *Rex v. William York*, *Foster's Crown Law*, 70, the leading case upon the liability of infants for their crimes, it was held that a child ten years of age could be guilty of murder.

The confessions of the child were also taken, in that case, as evidence of the commission of the crime; but after repeated examinations of the child, upon time allowed for that purpose, and the strictest inquiry into the nature and circumstances of the act, so as to satisfy the court that the confessions were not made at the instigation of some other person.

There is appended to this case, in vol. 1 of *Leading Criminal Cases*, p. 71, a learned and elaborate note, by E. H. Bennett, one of the editors, containing a careful review of the English and American cases upon the subject of the infant's liability for crimes during the several periods of his minority.

As to their liability under the age of seven years, after premising that the elementary writers most uniformly lay down the rule that, under this age, innocence

leged from punishment in certain cases, when that punishment is inflicted by statute, and they are not named. The rule is this: If a statute be made, punishing an offense corporally, infants, who are above fourteen, are bound, whether named or not. So,

is a presumption of law, and that "no averment shall be received against that presumption," citing Hale's Pleas of the Crown, 27; Minor Oh., 4; Plowden, 19a; Dalton's Justice, ch. 147, p. 334; 1 Hawk. P. O., 2; 4 Bl. Com., 22, 23, the editor says: "But it remains to be judicially determined that, if an infant, under the age of seven years, is proved to have sufficient discretion, and to know good from evil, he is not liable to prosecution as well as one above that age. The maxim, *malitia supplet aetatem*, seems to apply as well to one under as to one above that age."

As to their liability between the age of seven and fourteen, "all the authorities," says the learned editor, "agree that, at that age, criminal responsibility commences, and, subject to the presumption in favor of infants, they are answerable for any and all crimes committed by them, whether felonies or misdemeanors," citing Dalton's Justice, p. 234, ch. 147; Starford Les. Plas. del. Coron., ch. 19; Year Books 3 Henry VII, p. 1; 4 Bl. Com., 23; Hale's Pleas of the Crown, ch. 25, note n; 4 Boston Law Rep., 329; The State v. Gwynne, 9 Humph., 175; Commonwealth v. Keagg, 1 Ashm., 248. People v. Kendall, 25 Wend., 399, was the case of one, nineteen years of age, indicted for obtaining goods under false pretenses.

Of what this "presumption in favor of infants" consists, which is spoken of above, clearly appears from the opinion of LITTLEDALE, J., in Rex v. Elizabeth Owen, 19 Eng. C. L. Rep., 363 (4 C. & P., 236), who said: "In this case, there are two questions: first, did the prisoner take these coals; and, secondly, if she did, had she, at the time, a guilty knowledge that she was doing wrong. The prisoner, as we have heard, is only ten years of age, and unless you are satisfied, by the evidence, that, in committing this offense, she knew that she was doing wrong, you ought to acquit her. Whenever a person, committing a felony, is under fourteen years of age, the presumption of law is that he or she has not sufficient capacity to know that it is wrong, and such person ought not to be convicted, unless there be evidence to satisfy the jury that the party, at the time of the offense, had a guilty knowledge that he or she was doing wrong."

There is a conflict of the law of England and this country upon the liability of infants for the crime of rape. The learned editor quotes from the case of Rex v. Eldersham, 3 Carr. & Payne, 396, as declarative of the doctrine established at the present time as follows: "This boy, being under fourteen, cannot, by law, be found guilty of a rape, except as principal in the second degree. From his age, the law concludes it impossible for him to complete the offense, and that, in my judgment, must be held to negative the intent alleged in the first count." To the same effect is Rex v. Goombridge, 7 Carr. & Payne, 736; Reg. v. Jordan, 9 id., 118.

On the contrary, the rule in this country, where the age of puberty is frequently earlier than it is in England, may be assumed to have been definitely expressed by READ, J., in Williams v. The State, 14 Ohio, 222, for whose opinion the editor entertained so high a respect that he has embodied a large part of the same into

too, if the statute declares that such an offense shall be considered as an offense of a certain description, which offense had been, heretofore, punished corporally, infants are bound, although not named: As when the English statute was enacted, declaring, that the maliciously shooting cattle should be felony, which was *only a trespass before; felony, by the laws of that country, being punishable with death; in such case, an [*258] infant would be liable to the punishment of felony if he should transgress that statute, whether infants were mentioned in that statute or not. If the statute punishes corporally an act that was not an offense at common law, or that was an offense, but not before punished corporally, and does not constitute it an offense by name, which, by the common law, is punished corporally, an infant (if infants be not named in the statute) shall not be punished corporally. (a) Tenderness to infants led to this construction of the statutes, that minors should not be ousted of their common-law privilege, unless the legislature had ex-

(a) *Flow.*, 561; *Cro. Jac.*, 374; *Co. Litt.*, 247; *id.*, 387.

the note. READ, J., says: "Modified, then, to our own circumstances and condition, the law is this: An infant under the age of fourteen years is presumed to be incapable of committing the crime of rape, or an attempt to commit it; but that presumption may be rebutted by proof that he has arrived at the age of puberty, and is capable of emission, and consummating the crime;" citing *Commonwealth v. Lanigan*, 2 *Law Rep.*, 49.

The case of the *Commonwealth v. Green*, 2 *Pick.*, 380, is cited with disapprobation. In that case, a minor was held indictable for an attempt to commit a rape, though it was admitted that he was incapable of committing the crime himself. The court are reported to have said (PARKER, Ch. J., dissenting), that "a minor of fourteen years of age, or just under, is capable of that kind of force which constitutes an essential ingredient in the crime of rape, and he may make an assault with an attempt to commit that crime; although, by an artificial rule, he is not punishable for the crime itself. An intention to do an act does not necessarily imply an ability to do it."

The answer to which is, in the language of READ, J.: "If, in contemplation of law (which was admitted in the above case), the crime cannot be committed, and can have no legal existence, how can he be guilty of attempting it?"

The confessions of an infant, if otherwise competent, are held admissible against him, in the same manner as the confessions of adults. *Rex v. Wild*, 1 *Moody C. C.*, 452; *Rex v. Upchurch*, *id.*, 465; *Mather v. Clark*, 2 *Alk.*, 209; *Rex v. Thornton*, 1 *Moody*, 29; *Commonwealth v. Zard*, *Roscoe's Crim. Ev.*, 28, note.

pressly declared that they should be. It is a general rule, that an infant, at any age, is not liable for a misdemeanor; which consists in not doing what the law commands to be done. Foster, 70. (1)

It is also a rule, that a minor shall not be convicted on his own confession, without great caution being exercised by the triers.

Where the minor has committed a tort with force, he is liable at any age; for, in case of civil injuries with force, the intention is not regarded; for, in such case, a lunatic is as liable to compensate in damages as a man in his right mind. (2)

(1) The nature of the offense committed by the infant is important to be considered, with reference to his liability to be punished for crimes. For a notorious breach of the peace, a riot, or battery, he is liable to be punished as an adult, as also if he perjure himself in point of age, or otherwise; but if the charge against him is for a mere non-feasance, in some cases he will be privileged by his non-age, if under twenty-one, though above fourteen. So, if he be convicted of a dissection, with force, yet he shall not be imprisoned for it, because his infancy is an excuse, by reason of his indiscretion. 1 Russ. on Cri., 2.

(2) Though it is certain that infants are liable in actions *ex delicto*, still it has long been settled that the act complained of must be wholly tortious in order to charge them; and that a matter, arising *ex contractu*, though infected with fraud, cannot be changed into a tort, in order to charge the infant in trover or case, by a change in the form of action. Jennings v. Randall, 8 T. R., 326; Vasse v. Smith, 6 Cranch, 226. When an infant hired a horse and gig to go to C, but, instead of going to that place, went to G, in an opposite direction, and, by severe usage, the horse was killed, it was held that his infancy was a bar to the action. Penrose v. Curran, 3 Rawle's Rep., 351; S. P. Wilt v. Welsh, 6 Watts, 9. Of their liability for their tortious acts generally, see Loop v. Loop, 1 Vt. Rep., 177; Humphrey v. Douglas, 10 id., 71; Peigne v. Sutcliffe, 4 McCord's Rep., 387; Miles v. Graham, 4 Bos. & Pull, 140; Homer v. Thwing, 3 Pick., 492; Bristow v. Eastman, 1 Esp. Rep., 72; *contra*, Campbell v. Stokes, 2 Wend., 137; Munger v. Hess, 28 Barb., 75.

Infancy is a good defense to an action *on the case* for deceit and false warrant in the sale of goods. Prescott v. Norria, 32 N. H., 101; Green v. Greenbank, 2 Marsh. 485; Morrill v. Aden, 19 Vt., 505. And an infant is not estopped from setting up his infancy as a defense to a contract which he entered into, under a fraudulent representation that he was of age. Merriam v. Cunningham, 11 Cush. (Mass.), 40; West v. Moore, 14 Vt., 447; People v. Kendall, 25 Wend., 399; Price v. Hewitt, 18 Law. and Eq. Rep., 523; Burley v. Bissell, 10 N. H., 184; Brown v. McCune, 5 Sandf., 225.

The foregoing actions were brought on *the contract*, to which infancy is always a complete answer. But infants are liable, equally with adults, for their torts. The

There is one species of wrong for which an infant cannot be liable until he is *doli capax*, viz., slander. I find nothing satisfactory on this subject, as to what age he is liable. By analogy to his liability for crimes which rests upon his being *doli capax*, I should suppose that he would be liable at the age of fourteen.

We find it mentioned in the elementary writers that he is liable at seventeen years of age; and for this, Noyes' Reports, page 29, are cited; but that proves nothing more than that an infant of that age was rendered *liable in an action for slander; for that was the case of the defendant before the [*259] court. But no rule can be drawn from this report that he would not have been made liable at an earlier period; as there is no special reason, that can be conceived of, why he should be liable at that age, and not before. At the age of fourteen he is, in presumption of law, *doli capax*. At this age, therefore, I apprehend that a minor is liable in an action for slander.

It is laid down as a rule, in the elementary writers, that an infant cannot be liable for his fraud in a contract, in a civil action; and several authorities are cited, to prove this position. It seems to me, that this position is destitute of principle. Infants are not liable for their contracts; but may be for their torts. The contract, and the fraud in a contract, are very distinct things. On the first, he would not be liable; but I cannot conceive of any reason why an infant, who is *doli capax*, and commits an injury by practising fraud, should not be liable to compensate in damages the person injured. It is a point not to be disputed,

action in such cases should not be assumpsit on the contract, but in form *ex delicto*. An infant is liable in tort for obtaining goods fraudulently, with intent not to pay for them. *Wallace v. Morse*, 5 Hill, 391; *Badger v. Phinney*, 15 Mass., 359; *Homer v. Thwing*, 3 Pick., 492. And an infant is punishable by indictment for obtaining goods under false pretenses. If under fourteen, he is presumed *doli incapax*, and the burden of proving him to be of sufficient mental capacity rests with the prosecution. *People v. Kendall*, *supra*. If an infant hire a horse and willfully and intentionally injure the animal, he thereby disaffirms the contract and is liable in trespass. *Campbell v. Stokes*, *supra*. He is liable civilly for an assault. *Bullock v. Babcock*, 3 Wend., 391. And he is answerable for his own trespass; and the father is not answerable for it, if committed without his authority or approval. *Tift v. Tift*, 4 Denio (N. Y.), 175.

that he is liable to be indicted for a fraud practised in a contract, under the same circumstances as an adult would be liable. He is liable, *criminaliter*; why should he not be liable, *civiliter*? This doctrine, which I am combating, has not always been cordially acquiesced in by the English courts. The good sense of PARKER and TREVER revolted against it; (a) and not willing directly to overthrow the established precedents, they say that an infant should not be admitted to plead infancy, when trading as an adult, and charged with fraud. (b) At a later period, Lords MANSFIELD and KENYON have both discovered symptoms of disgust with this doctrine. Lord MANSFIELD says, the privilege of an infant is given to him as a shield, and not as an offensive weapon; and Lord KENYON says, that an infant would be liable in an action sounding *in contract, if it arose, *ex delicto*, from fraud, a tort. With the support of such respectable authorities, I shall hazard the rule, that an infant is liable, *civiliter*, for his fraud in a contract. (c) (1)

There is a case in Comyn's Digest, 294, title Chancery, which shows that when an infant has entered into an agreement, with a fraudulent intent to derive an advantage to himself, by not fulfilling his engagements, he may be compelled in chancery to perform it: As when a father was about to make a settlement of the value of \$1,000, out of the estate which by law would descend to an infant, upon the younger son; the infant promised the father, if he would desist from making the settlement, that he would give to the younger son \$1,000: therefore, the father desisted from making the settlement; and the infant refused to

(a) 12 Vin., 203.

(b) 8 Bur., 1802.

(c) Peake, 228.

(1) The decisions of later times have fully confirmed the rule here laid down; and under them, infancy is no longer permitted to protect fraudulent acts. In the case of *Ex'rs of Loop v. Ad'rs of Loop*, 1 Vt. Rep., 171, it was held that infancy would not protect an executor in the fraudulent execution of his trust. So, too, in Massachusetts, where an infant obtained goods upon his fraudulent affirmation that he was of age, though he avoided payment of the price, on the plea of infancy, still the vendor was held entitled to reclaim them on the ground of his never having parted with property in them. *Badger v. Phinney*, 15 Mass., 359. In a case in the 12th of Sergeant and Rawle, it was suggested that there might be such a case of palpable fraud in an infant arrived at an age of discretion, as would render a release of his right to land binding on him.

fulfill his promise, relying upon his infancy to protect him from fulfilling his contract. But chancery would not suffer him to avail himself of his fraudulent intention; and compelled him to pay to the younger son the \$1,000.

Where the cause of action arises from contract, an infant can never be made liable in action sounding in tort. (a) (1)

*CHAPTER VI.

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OF INFANT BEING BOUND BY CONDITIONS ANNEXED TO A GRANT OF AN OFFICE EXPRESSLY. WHETHER LIABLE TO ANY ANNEXED PENALTY FOR NON-FULFILLMENT. OF THEIR BEING BOUND BY IMPLIED CONDITIONS. OF THE LAW RESPECTING THE PREJUDICES THEY MAY RECEIVE FROM LACHES. OF THEIR ABILITY TO HOLD OFFICES, WHETHER JUDICIAL OR MINISTERIAL. OF THEIR ABILITY TO EXECUTE A POWER OVER REAL ESTATE.

It is a rule of law, that whenever an estate or office is granted to an infant, to which there is annexed a condition, if the infant do not a certain thing, he shall forfeit the estate or office; the infant is bound by this condition; but, if the condition had annexed any penalty, other than the forfeiture, the infant would not be bound by this penalty. The grantor may reasonably require that the estate should return to him, if the things are not done, the doing of which constituted the consideration of the grant; but it is not reasonable that he should have the power of inflicting a penalty on infants, whose indiscretion might, in such case, destroy their privilege. (b)

Whenever there is a condition implied by law, that requires fidelity or skill, an infant is bound by it. (c) This is the case in the grant of all offices. If, then, an infant have the grant of an office, and do not execute it with skill or fidelity, he forfeits

(a) 2 T. Rep., 265.

(b) Co. Lit., 246.

(c) 8 Co., 44; Co. Lit., 263.

(1) See note to page 386, *ante*.

his office. If the condition implied by law, which is annexed to an estate, works a forfeiture, when the forfeiture is to arise from some tortious act of the tenant, an infant is as much bound [*262] * as an adult. For instance, the law declares that tenants who commit waste, shall be liable to treble damages, and forfeit their estate. (a) In this case the infant is bound; but in other cases, if there be no tort committed, where the acts of an adult will forfeit his estate, an infant will not. If an adult should alien his life estate, or should alien his mortmain, he forfeits his estate; but an infant would not. (1)

It is a general rule, that an infant shall not be prejudiced by laches. And therefore it is, when a stranger dies seised of land belonging to an infant, and the land descends to the heir of the stranger, the infant's right of entry is not taken away. (2) Yet, there are a variety of exceptions to this rule in the English law, most of which can have no existence in the United States. Where an estate is granted to an infant or his ancestor, and a

(a) Plowd., 364; 5 Bac., 474; 8 Co., 4; 1 Roll. Abr., 381.

(1) By the common law, infants were capable of holding such offices as did not concern the administration of justice; but only required skill and diligence in their execution. Bac. abr. tit. Infancy, E. And if any condition annexed to such office was not fulfilled, it was forfeited. 3 Mod. Rep., 224.

It was held in *Barrett v. Seward*, 22 Vt., 176, [POLAND, J., dissenting.] that, an infant might receive a special deputation from the sheriff, under a statute giving to the sheriff power to depute any proper person to serve a writ, at the risk of the plaintiff, &c.

The case was decided upon the ground of the sheriff's liability under the statute, for all acts of his special deputy, equally and to the same extent that he would be for the acts of his general deputy; and if such deputy was appointed at the request of the plaintiff in the writ, the sheriff would still be liable to the defendant, and to third persons, the same as for the acts of a general deputy. The same result was arrived at in *Moore v. Graves*, 4 N. H., 408, and upon the same ground.

In *Harvey v. Hall*, 22 Vt., 211, it was decided that, an infant could not be specially authorized to serve *mesne* process, by the magistrate signing the same.

The case was put upon the ground that, in the case of a special authorization by a magistrate, as the infant would not be liable to the defendant, for any injury he might sustain, either for misfeasance, or nonfeasance, for a false return, &c.; that there would be no principal to be made liable in these particulars — there being no statute making the magistrate liable, as in the case of a sheriff.

(2) *Allen v. Sayer*, 2 Vern., 368.

condition is annexed to the estate, a non-performance of this condition will bar him of a right to the land forever. (a)

Infants are bound by the statutes of limitation, unless their rights are especially saved. (b) (1)

An infant can hold no judicial office, from a supposed want of discretion. He can hold a ministerial office; for this can be executed, by deputy; unless, for the due performance of it, the law requires that an oath be administered to the holder of the office. For this reason, an infant cannot be an attorney. In cases where the office is executed by deputy, the chancellor, the supreme guardian of all infants, appoints the deputy. (c) In cases where an infant may execute an office, he is bound by his official acts, and liable for his defaults; as when an infant jailer suffers an escape, he is liable for the escape. (d) (2)

An infant cannot execute a power over real estate, which requires any discretion; but if the special manner * of executing the power, be pointed out in the instrument [*263] granting the power, so that no room is left for the exercise of discretion, an infant may execute it. (e) But an infant may execute a general discretionary power over personal estate, if such infant be of sufficient age to bequeath such estate by will.

(a) Co. Lit., 246.
(c) Hob., 335.

(b) Pra. in Can., 518; Cro. Elix., 696; Co. Lit., 2.
(d) 5 Co., 17; 3 Mod., 322.
(e) 3 Atk., 69; 1 Vern., 308; Pow. on Pow.

(1) See *Wych v. East India Company*, 3 P. Wms., 309; *St. John v. Turner* 2 Vern., 419; *Griffin v. Griffin*, 1 Sch. & Lef., 352.

(2) The statutes of many of the states exclude an infant from holding a civil office; but the doctrine of the common law is, no doubt, correctly stated in the text. See Bac. Abr., tit. Infancy, and cases there cited. The office of a clerk of the peace, being merely ministerial, may be held by him. *Grosble v. Harley*, 1 Alcock & Nap., 431. In New York he is incapable of holding any civil office. *The People v. Dean*, 3 Wend., 433. By the common law, also, he might act as executor, but this right is also taken away by statute in many of the United States.

If he be elected constable and execute process as such, it was held, that he is a trespasser. *Green v. Burke*, 23 Wend., 49.

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* CHAPTER VII.

OF SUING BY GUARDIAN, AND WHEN BY PROCHEIN AMI. OF THE
LIABILITY OF GUARDIAN AND PROCHEIN AMI FOR COSTS. OF
INFANT DEFENDANT'S APPEARANCE BY GUARDIAN.

WHEN an action at common law was brought in favor of an infant, he was obliged to sue by guardian; (a) and could not sue in any other way. But, by the statutes of Westminster, he may sue by his *prochein ami*, in certain cases. (b) It is contended by some, that he may sue by *prochein ami* in all cases; but the authorities teach a different doctrine. If it was allowable for an infant to sue by his *prochein ami* in all cases, he might squander his property in needless suits, in spite of his guardian; (c) and indeed, it would be wholly destructive of that necessary control of the guardian over the infant, with which the law has invested him. I apprehend the infant can never sue by *prochein ami*, against the mind of the guardian. The cases in which an infant sues by *prochein ami*, are cases of necessity. (1) When the

(a) Roll. 235, 250. (b) Co. Lit., 125; Cro. Car., 56. (c) Hut., 92; Cro. Jac., 600.

(1) The offices of guardian and *prochein ami* are entirely distinct; and the privilege of suing by *prochein ami*, did not exist before the statutes of Westm. 1, c. 43, and Westm. 2, c. 15; and is given only in cases of necessity, as where an infant is to sue his guardian, or is eloiigned, or where the guardian will not sue for him. In all except these special cases, the suit should be by guardian, and not by *prochein ami*. Bac. Abr., tit. Infancy, K. In Vermont it has been held, that, although he has a guardian, he may sue by his next friend, if the guardian do not dissent. *Thomas v. Dike*, 11 Vt. Rep., 273; *Robson v. Osborn*, 13 Texas, 298.

The person named as next friend, is not, for any purpose, a party to the suit. *Brown v. Hull*, 16 Vt., 673; and in case of petition to vacate a judgment obtained by an infant, who sued by his next friend, the service upon the infant will be sufficient. *Id.* Upon the reversal of a judgment, obtained by an infant in the name of his next friend, the judgment and costs shall be against the *prochein ami*. *Yeiger v. Stone*, 7 Monr., 189. In New York, it appears that, the *prochein ami* should be appointed previous to the issuing of a *capias*, at the suit of an infant. *Fitch v. Fitch*, 18 Wend., 513; but after plea pleaded, a defendant cannot move to set aside the plaintiff's proceedings, on the ground that the suit is prosecuted without the appointment of a *prochein ami*. *Fellows v. Niver*, 18 Wend., 565.

In Alabama, *Bother v. McCall*, 3 Ala., 449, leave of Court need not be obtained to bring a suit in name of next friend. He is but a species of attorney, who may

infant sues his guardian, it must be by *prochein ami*; and also when he has no guardian; and if his guardian be absent out of the country, and cannot appear for him; and when the guardian so far countenances the suit, that he will not forbid the infant to sue by *prochein ami*: but if the guardian will not consent that the suit should be brought, he cannot sue by *prochein ami*. When an infant commences a suit otherwise than by guardian or *prochein ami*, the defendant may plead his disability. (a) An infant wife may appear by an attorney, appointed by her husband. The * practice of suing by *prochein ami* is the same in Connecticut, as in England. I know it has been [*265] questioned by some, whether an action could be brought in those states where there is no statute to warrant it, by *prochein ami*. The answer to this objection is, that the statutes of England, as ancient as the statutes of Westminster, which were enacted long before the emigration of our ancestors to this country, and applicable to the circumstances of this country, have been considered, with us, as high authority as the common law itself.

The term *prochein ami*, means any person who claims to appear as such for the infant. And any person may sue for an infant in his name, without his consent; but the court before whom the suit is brought, if he be an improper person, or has brought an improper claim before the court, will dismiss the suit. (1)

(a) 2 Rol., 287; 2 Saund., 212.

prosecute for the infant, but can do nothing to operate to his injury, and cannot, therefore, release or compromise a suit, prosecuted in behalf of a minor. He is admitted to proceed, for otherwise, the infant might be prejudiced by the neglect, or refusal of his guardian. *Isaacs v. Boyd*, 5 Port., 388; *Hamilton v. Foster*, 7 Brevard, 464.

It is held in *Keeron v. Glowver*, 5 Black., 604, that, unless the *prochein ami* of an infant plaintiff, is appointed by the Court, the defendant is not obliged to plead to the action, and may have the suit discharged.

A judgment of *nil dicat* against an infant, is held not to be void, but erroneous *White v. Alberson*, 3 Dev., 241.

Upon a presentment against the infant for a misdemeanor, the infant has a right to appear and defend himself, in person, or by attorney; and it would be erroneous for him to have a guardian assigned, and try the cause on a plea pleaded by the guardian. *Word's Case*, 3 Leigh., 743.

(1) *Andrews v. Craddock*, Abr. Eq., 72. He is answerable for the costs of the suit, and therefore brings it at his peril. A court of chancery will, upon its own

An opinion formerly prevailed, that a *prochein ami* must be a relative of the infant; but the law now is, that this is not necessary. 1 Atk., 571. So, a stranger, as *prochein ami*, may demand, on behalf of an infant, an account of the guardian before the infant has arrived at full age.

A guardian and *prochein ami* are liable for costs of suit, in case the infant fails in the action, and execution issues against them; but, if their conduct were proper in bringing the suit, they will be refunded their cost, out of the infant's property. (a) But if the suit were brought wantonly or ignorantly, they must pay the cost without hope of reimbursement. There seems to be a diversity of opinion, whether the successful defendant may not elect to take execution either against the infant, or his guardian. (b) I take it that the better opinion is, that no execution for cost, can issue against an infant. For cost came in lieu of [266] the common law amercement of the * plaintiff, *pro falso clamore*; and the infant could not be subject to an amercement; and of course, could not be liable for its substituta. (c) (1)

(a) Bar., 206, 1028 (2) G. L. R., 87; Ore. Cir., 198; Eq. Co. Abtr., 288. (c) 1 Lev., 78.

motion, or upon petition, direct a reference to ascertain whether a suit, prosecuted for an infant by *prochein ami*, is for the benefit of the infant. The People v. New York, C. P., 11 Wend., 164.

(1) It is said, in Bacon's Abridgement, tit. Infancy, K., that the infant is not liable to costs, but that the *prochein ami* is; and if he refuse to pay them on demand, the court will grant an attachment against him. The *prochein ami*, being liable for costs, cannot be examined for the infant. Hopkins v. Neil, 2 Str., 1026. And his declarations may be given in evidence against the infant. Slaughter v. Talbot, Barnes, 128. In Price v. Sykes, 1 Ruff., 87, it was held that an infant who prosecuted an unjust claim at law, and thus compelled the defendant to come inr equity for an injunction and relief, and who then sets up an inequitable defense must pay costs.

Where the bill of the infant is dismissed with costs, upon a fact, which, though not known when the bill was filed, yet with due diligence might have been known, the *prochein ami* will not be allowed costs out of the infant's estate. Pierce v. Pierce, 9 Ves., 548.

Held, in Crandell v. Slaid, 11 Met., 288, that according to the statute which provided that, "in all actions the party prevailing shall be entitled to his legal costs against the other," an infant would be liable for costs and consequently a *prochein ami*, as such was not liable. Held, in Dalrymple v. Lamb, 3 Wend., 424 that the next friend must be a responsible person. And if an infant sue without a *prochein ami* the defendant waives the irregularity by pleading to the merits. Fellows v. Niver, 18 Wend., 563.

On a bill filed by *prochein ami*, an infant pays no cost. Yet, if he comes of age before the suit is at an end, and will proceed, he must pay cost; and if the suit were improperly brought, he has his remedy against his *prochein ami*. 2 Pow., 277. I apprehend the practice in Connecticut, is different: the guardian, or next friend, is eventually liable for cost, in the same manner as he is, who gives bonds for the prosecution of a suit. If the infant prove unsuccessful, execution for cost issues against him; and if it can be satisfied out of his property, this puts an end to any further proceedings: if it cannot be satisfied out of any property of the infant's that can be found, the officer who holds the execution to collect, returns a *non-est*, as to the property of the infant; and thereupon, the guardian, or next friend, becomes liable for the cost, on a *scire facias*, founded on the judgment against the infant. If the suit were an improper act in the guardian, and the infant is obliged to pay cost, he has his remedy against his guardian. Both the guardian and the next friend must be permitted to appear for the infant by the court, and the court will inquire into their qualifications to prosecute a suit: (a) this arises from the anxious solicitude always expressed by the law, for infants; that they may not be injured by an improvident guardian, or next friend. They may, indeed, commence suits without permission from the court, but they cannot prosecute them without permission. This is not the law practised in Connecticut, so far as relates to guardians. No inquiry is made by our courts, into the qualifications of guardians. Perhaps they would, if complaint were made by some friend of the infant, that the guardian was prosecuting a suit to the detriment of the minor. But no *prochein ami* * can appear before our courts, unless he be regularly admitted to appear. It is said, tacit admittance [*267] is sufficient; if it be, it destroys the whole effect of the rule.

Where an infant is a joint executor with an adult, he may appear by attorney appointed by the adult; but when he is sole executor, he must appear by guardian, &c. (b) (1) An infant

(a) 1 Stra., 304; id., 709; Latch, 263.

(b) Cro. Jac., 341; 1 Vent., 103.

(1) Bac. Abr., tit. Infancy, K.

defendant must always appear by guardian; he can never appear by *prochein ami*; so is the common law, and there is no statute that varies it. (a) In the case of an infant defendant, or in case of an infant plaintiff, an infant wife must appear by guardian. Although an infant plaintiff is not liable to cost, an infant defendant is; and, when judgment is had against him, execution issues against him for cost and damages. (b) When an infant is sued that has no guardian, no judgment can be rendered against him until the court appoint a guardian *pro re nata*; which the court is empowered to do. And if the minor who is sued have a guardian, he must be notified. In such case, when the guardian is not notified when the writ issues, the suit will not abate; but a summons will issue from the court, notifying him of the suit. If the infant have a guardian before the commencement of the suit, the court may appoint a guardian *ad litem*, provided the guardian is out of the reach of the process of the court: whether superior or inferior, such court may appoint a guardian to defend in that suit. (1)

If an infant have a judgment rendered against him, and do not appear by guardian, it is error; and the judgment may be reversed by a court *coram nobis*. (c) If an infant be sued, and no guardian be summoned, and indeed he has none, and judgment go by default, still it is error. There seems to be some great defect in the law; for in such cases the infant has only to suffer a default, and he effectually eludes justice. And in case [*268] the infant has a guardian,* and the guardian will not appear, and there is no compulsory process to make him appear, yet the judgment, by default, is erroneous. In *Cov-*

(a) Pal., 225, 260; Hob., 266; 1 Vent., 185.

(b) Stra., 1217; 1 Buls., 180; 3 Bl. Com., 497; 1 Co., 53; 2 Lev., 126.

(c) Cro. Jac., 640; Yel., 58; Carth., 267.

(1) Where the infant is sued, and appears by attorney, the plaintiff must move that the appearance be amended, by the substitution of a guardian. *Hindmarsh v. Chandler*, 7 Taunt., 488. It is so well established that, if an infant defendant appear by attorney, it is error, that it is deemed unnecessary to cite any of the numerous authorities to the point. But when judgment of nonsuit is given against an infant plaintiff, it is no ground of error that he appeared by attorney. *Bird v. Pegg*, 5 Barn. & A., 418.

necticut, in the latter case, it has been determined that it is not error, if the guardian have been summoned, and does not appear. So, too, it seems as if the law had put it into the power of the guardian to evade the law. By an English statute, when an infant appears by attorney, and judgment passes for him upon verdict, the judgment shall stand. (a)

If an infant be sued with others, and judgment be rendered against them all, and the infant appear by attorney, the judgment is not only erroneous as it respects the infant, but also as to the adults. (b) As if A, an infant, and B, an adult, be sued in trespass: A appears by attorney, and both are found guilty: this is erroneous as to both; and will be reversed *in toto*. It is not very easy to discover the principle upon which this doctrine is founded. There seems to be no reason why judgment against the adult should be reversed, because the judgment against the infant was erroneous. All that the law demands would be answered, if the judgment were reversed as to the infant only. If the law were so that, betwixt the adult and the infant, there was any obligation on the infant to pay his moiety of the damages, it would seem reasonable that the judgment should not stand, unless it was against both. But there is no such obligation. If the plaintiff had sued the adult alone, and had obtained judgment, this judgment would be valid. There is no necessity that he should sue the minor; and if the judgment should be reversed as to him, it would be in the same situation as if the infant had not been sued. If the plaintiff in the judgment was obliged to collect his proportion out of both defendants, when a judgment was against both, it would seem reasonable that the judgment should not stand, unless it was against both. But *this [*269] is not the case: if the judgment had been against both, the plaintiff in the execution could have collected the whole out of the adult. If, in such case, the adult would have any remedy against the minor, by compelling him to contribute his share of the judgment, which he has paid, it would seem reasonable that the judgment should not stand, unless it was against both. But the law is so, that if the judgment had been against both, and

(a) Cro. Jac., 441, 580.

(b) Cro. Jac., 397; 1 Rol., 776; 3 T. R., 495.

the sum had been paid by the adult, he would not have any remedy against his partner, to have compelled him to contribute; for it was a judgment founded on a tort. I can conceive of no possible reason, which, on principle, can support the decision of the English courts. In Connecticut, such judgment is erroneous only as it respects the infant. If, in a case circumstanced as the above, several damages had been assessed against the adult and minor, each one thousand dollars, the judgment against the minor alone would be subject to a reversal; for, in that case, the plaintiff could release the damages against the infant, and take out execution only against the adult. (a)

[*270]

* CHAPTER VIII.

OF CHILDREN, AS LEGITIMATE AND ILLEGITIMATE. OF THE MODERN RULE OF DETERMINING WHO WERE LEGITIMATE, AND WHO NOT. OF THE EFFECT OF AN INTERMARRIAGE OF A FATHER OF A CHILD, AND THE MOTHER OF THE SAME CHILD, WHICH CHILD WAS ILLEGITIMATE. OF THE DISABILITIES UNDER WHICH AN ILLEGITIMATE PERSON LABORS. OF THE PLACE OF SETTLEMENT OF AN ILLEGITIMATE CHILD. OF THE LIABILITY OF THE PUTATIVE FATHER TO ASSIST IN SUPPORTING AN ILLEGITIMATE CHILD, AND OF THE PROCEEDINGS TO COMPEL A PERFORMANCE OF THIS DUTY. OF THE LIABILITY OF THE PUTATIVE FATHER TO SAVE THE TOWN OR PARISH FROM BEING LIABLE TO SUPPORT SUCH CHILD, IF IT SHOULD EVER BECOME A PAUPER. OF THE PROCEEDINGS AT LAW TO ATTAIN THIS OBJECT.

CHILDREN are legitimate, or illegitimate. (a)

A legitimate child is defined to be one born in lawful wedlock, or in a competent time afterwards. An illegitimate child is defined to be one born out of lawful wedlock. Neither of the above definitions are accurate; for a child may be born in wedlock, and yet be illegitimate; as a child

(a) Bar., 3022; Str., 120, 202.

(b) Co. Lit., 244.

born when the husband could not have had access to the wife, in a competent time previous to the birth of the child; and a child might have been begotten out of wedlock, and then the parents have married, and the father have died before the birth of the child, such child would not have been begotten or born in wedlock; and yet it would have been legitimate.

It was always admitted, that it was possible that a child born in wedlock, might be illegitimate. It was admitted, * in case there was no access of the husband, and also, where [*271] the husband is impotent. But the only allowable method of showing want of access, rendered it almost impossible to prove illegitimacy from that source. If it could be shown that the husband was not within the four seas, from the conception of the child to its birth, it was proof of illegitimacy: But no other evidence was admissible; not even if it could be proved that the husband had been confined in a dungeon, for years before the birth of the child, and had never seen any person but the jailer. The court could not admit this evidence, as a proof of no access to the wife; and, in case of not having been *intra. quatuor maria*, he must have been absent, not only at the time of conception, but during the whole time of pregnancy: for, if the husband had been absent, beyond sea, for five years, and had returned only one day before the birth of the child, such child would have been legitimate; and the rule was, if a man should have been absent from England ever so many years, and on his return should marry, and his wife the next day should have a child, such child would be legitimate. (a)

These rules, so opposed to common sense, and the rules of evidence in other cases are now abolished; and illegitimacy is now proved as any other fact is proved. The question of access is left to the jury, under all the circumstances attending the case. Every proof of this kind is admitted in the mass of evidence, viz., that the mother has cohabited with other men beside her husband, and has called the child by the name of her paramour, and the like. (b) The issue of a marriage, null *ab initio*, are illegitimate; as where the husband has another wife living; as in

(a) 5 Co., 36; 2 Str., 940; Salk., 130, 132; Carth., 122; Co. Lit., 244; L. Ray., 305
(b) 4 T. R., 238; Cowp., 584.

England, where there has been a divorce, *a vinculo matrimonii*, on account of the canonical disabilities of consanguinity and affinity.

[*272] It is true, indeed, that such issue is not bastardized, until a divorce has taken place; * for, if one of the parties die, either husband or wife, before there has been a divorce, no inquiry can be made with respect to the validity of the marriage. (a) In Connecticut, a marriage within the Levitical degree (except a marriage with the sister of a former wife, which is lawful by statute) is null and void; and, of course, no divorce is necessary; for, in such case, there is no marriage, and the issue are bastards. (1)

The wife is not an admissible witness to prove that her husband has had no access to her: she is rejected, on principles of morality: it is considered to be *contra bonos mores*. (b) She, however, is admissible to prove her incontinency. (2) Both husband and wife are witnesses to prove the fact of marriage, and the time when, and also the time of the child's birth; which may be conclusive evidence as to the child's illegitimacy; for, if

(a) Co. Lit., 285; 1 Bl. Com., 425, 440, 455.

(b) Cowp., 594; B. N. P., 112.

(1) The strictness of the old rule, that legitimacy depended entirely and conclusively upon the fact of the husband being *infra quatuor maria*, was first relaxed in the case of *Pendrell v. Pendrell*, Strange's Rep., 929, and since that time the following rule has obtained, co-extensive with the common law; that where it clearly appears to the jury that the husband could not have been the father of the child, it is a bastard, though born, or begotten and born, during marriage. *Rex v. Luffe*, 8 East, 193; *Heard v. Heard*, 1 Sim. & Stu., 150; 1 *Turner & Russell*, 138, S. C.; *Cross v. Cross*, 3 Paige's Rep., 139; *Commonwealth v. Wentz*, 1 Ashmead's Rep., 269; *Commonwealth v. Shepherd*, 6 Binn., 286; *Bury v. Philpot*, 2 Mylne & Keene, 349.

Children born out of wedlock are legitimized by the subsequent marriage of the parents, in Texas and Minnesota. *Oldham and White's Digest, Laws of Texas*, p. 316, sec. 1415, Act of 1848; *Minnesota Statutes*, 1849, 1858, p. 462, sec. 18. And in Texas, "the issue, in marriage deemed null in law, shall nevertheless be legitimate. Act of 1848, as above.

(2) In Pennsylvania, she is admitted to prove the criminal connection with her, on an indictment for fornication and bastardy, but not to prove the non-access of her husband. *Commonwealth v. Shepherd*, 6 Binn., 283; and see *Rex v. Luffe*, 8 East, 202; *Rex v. Lubbenham*, 4 Term R., 254; *Rex v. Kea*, 11 East, 132.

And the mother of a child born in wedlock, but begotten before, is incompetent to prove that the child was not begotten by the man who afterwards became her

the child were born before marriage, it is a bastard. (1) The declaration of either of the parents, respecting the legitimacy or illegitimacy of their children, may be given in evidence after their death; but not whilst they are living. So, likewise, their evidence, given on a bill in chancery, between third persons, in which they stated any fact that proves the illegitimacy of their child, is good evidence after their death. (a) So, too, common reputation, inscriptions on tomb-stones, family registers, are good evidence of marriages, births and deaths, and where these events take place. (b) Where there has been a divorce, *a mensa et thoro*, and a child is begotten, and born after the divorce, the presumption is, that it is a bastard; for the law will suppose, unless there is evidence to the contrary, that the decree of the court, by which the parties have been divorced, has been obeyed. (2) But this presumption may be rebutted, by showing a connection betwixt the husband and wife; but if, after a voluntary separation, a child be begotten and born, the presumption is, that the * child is legitimate. But this presumption may be rebutted also. (c) It may be good policy thus to determine, that obstacles may be thrown in the way of voluntary

(a) Cowp., 585.

(b) Cowp., 494.

(c) 4 T. Rep., 356; Salk., 123; 7 Co., 13, 16; Str., 925.

husband before the birth of the child, in the absence of other proof of non-access. *Dennison v. Page*, 29 Penn., 420. The mother of an alleged bastard, who is a married woman, and whose husband was living at the time of the alleged illicit intercourse and the birth of the child, although she is, from the necessity of the case, a competent witness to prove the illicit intercourse, and to prove who is in fact the father of the child, is not competent, as a witness, to establish the non-access of the husband; nor his absence from the state; nor any other fact which may be proved by other testimony. *People v. Ontario*, 15 Barb., 286.

Where the legitimacy of a person is in question, the declarations of his mother are admissible after her death, being connected with a question of pedigree; if not made *post Mortem motem*. *Oaujolle v. Ferrie*, 26 Barb., 177. Affirmed, 23 N. Y. Rep., 90.

(1) *Starkie's Ev.*, P. 4, 223; *Lomax v. Lomax*, *coram*, Lord HARDWICK there cited.

(2) 1 Salk., 123. And where, after a divorce, *a vinculo*, the parties again intermarry, the issue of the marriage are said to be unlawful. *Inh. of West Cambridge v. Inh. of Lexington*, 1 Pick. Rep., 506; *Inh. of Medway v. Inh. of Needham*, 16 Mass. Rep., 157.

separations; but this presumption, it seems to me, does not rest on any probability of the fact. In most countries in Europe the civil law respecting legitimacy of children, has been adopted; and, by that law, if a child be begotten and born before marriage, if the parents afterwards intermarry, the child is legitimate. But by the English law, and by our law, such child, notwithstanding the marriage, is a bastard. (a) (1) If the birth of the child be after the marriage, although it was begotten before, yet it is legitimate. If a child be born after the marriage is dissolved by the death of the husband, the rule is, if it be born after the usual time of gestation, it is a bastard. (b) This time has been usually deemed to be forty weeks; but circumstances may attend the case, which will carry it, in some instances, beyond that time. (2) Whether these circumstances have existed in any particular case, will be learnt by the court from gentlemen of the medical faculty. (c) That it should be a universal rule, that if the child be born within the forty weeks, it is legitimate, is not reasonable. In case of sudden death, when the husband dies in full health, the conclusion is just; but it often happens that the husband is rendered imbecile by sickness a long time before his death. I should suppose that any circumstance of this kind might be given in evidence to evince the illegitimacy of the child.

It has been frequently laid down in the elementary writers that if the time when a child is born, be more than forty weeks after the death of the husband, such child is illegitimate. See Hargrave's Notes, Co. Lit., 129, from which it satisfactorily appears,

(a) 6 Co., 65; 1 Bl. Com. 454, 456.

(b) Cro. Jac., 541.

(c) Co. Lit., 128.

(1) In Vermont, it is declared by statute, that, where the parents of an illegitimate child shall intermarry, after the birth of such child, it shall, if recognized by the father as his child, be considered legitimate, and be capable of inheriting. Rev. Stat. Vt., 1839, p. 292.

A child born out of wedlock, and legitimate by the law of another state, is not thereby rendered capable of inheriting land in Pennsylvania. *Smith v. Der's Adm'rs*, 34 Penn., 126. In New York, a bastard can inherit real and personal property from his mother, in default of lawful issue, as if legitimate. 3 R. S., 5th ed., p. 43, sec. 20.

(2) The civil law, and the *code civil*, fixed the three hundredth day as the *ultimus tempus gestationis*. Dig., 38, 16, P. 11; Code Civil, art. 312.

that the time of pregnancy may, in some cases, be of longer duration * than forty weeks; although such greater duration affords strong presumption against the legitimacy of the child. [*274]

When a wife marries immediately after the death of the husband, and has a child born, so that, by the rule, it might be the child of either husband; it is said, that the child, when of age, may elect which husband he chooses for a father: (a) but evidence may always be adduced to show which of them was probably his father. Such an extraordinary case can very seldom happen. There is in the English law, a very singular doctrine on this subject of illegitimacy. It is the case of *bastard eigne*, and *mulier puisne*, i. e. when the parents have a child born before wedlock, and one after. (b) The former is called *bastard eigne*, and the latter, *mulier puisne*. If the *bastard eigne* should enter on the real estate of the deceased father, and continue seised until his death, and the estate should descend to his issue; the *mulier puisne*, or his issue, can never call in question the legitimacy of the *bastard eigne*.

A bastard cannot inherit to any person; (c) (1) and for this purpose, he is considered as not related to any person. He is said to be *filius nullius*, and having no inheritable blood. This doctrine cannot be founded on the supposed uncertainty of the father, for the law is the same, when the father acknowledges him to be his son, or intermarries with the mother, which furnishes the strongest evidence that he is his child. But he can no more inherit to his mother, than to his father; and, in that case, there is no uncertainty. I apprehend this rule to be partly founded in that anxiety which the law every where exhibits, to secure domestic tranquillity, and partly in policy, to discourage illicit commerce betwixt the sexes. If a bastard might inherit either to his father or his mother, where they had married, and had a family of children, it might be a great source of domestic uneasiness. Sarah * was not willing that Ishmael should inherit with Isaac; but in cases where the mother does [*275]

(a) 1 Bac., 312.

(b) Co. Lit., 244; 3 Law., 410; 1 Roll., 604.

(c) Carth., 365; Ld. Ray, 68

(1) See note to page 402, *ante*.

not marry; and where the parents intermarry, this reason ceases; and yet such persons cannot inherit upon principles of policy; (a) neither can any person inherit to him, except his issue.

This is the necessary consequence of the maxim, that he is *filius nullius*; for all other kindred but his children must be traced through a common ancestor to him and the relations. But he has no ancestor: he, therefore, can have no relatives in the ascending, or collateral line; and if he should die intestate, without any issue, no person could lay claim to his estate. It has been contended in the State of Connecticut, that whatever reasons might exist in favor of the law, as laid down in cases in general, that none existed why a mother of an illegitimate child might not inherit the estate of such child, who died intestate, and without issue. But it has been determined by the superior court, that she cannot inherit; and this judgment was affirmed by the supreme court of errors. (1)

(a) 1 Bl. Com., 439.

(1) In Vermont, by the Revised Statutes of 1839, it is expressly provided that illegitimate children shall inherit the estates of their mothers, and mothers the estates of their illegitimates. Rev. Stat. Vt., p. 292. In New York, "in case of the death without descendants, of an intestate who shall have been illegitimate, the inheritance shall descend to his mother; if she be dead, it shall descend to the relatives of the intestate on the part of the mother, as if the intestate had been legitimate." And by the act of 1855, ch. 547, "illegitimate children, in default of lawful issue, may inherit real and personal property from their mother, as if legitimate; but nothing in this act shall affect any right or title in or to any real or personal property already vested in the lawful heirs of any person heretofore deceased." See 3 R. S., 5th ed., pp. 42, 43, secs. 14, 20. In Texas, an illegitimate "shall inherit from his mother, and be entitled to distributive shares of the personal estate of any of their kindred on the part of the mother, as if legitimate." Oldham and White's Dig. Laws of Texas, p. 101, art. 354.

In Wisconsin "every illegitimate child shall be considered as an heir of the person who shall, in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child, and shall in all cases be considered the heir of his mother, and shall inherit his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock. R. S., Wis., 1858, p. 555, sec. 2. In Massachusetts it is held, that neither the mother, nor her relations can inherit a bastard's estate. *Cooley v. Dewey*, 4 Pick., 93. According to a writer of high authority, illegitimates can inherit the estates of their mothers, and mothers the estates of their illegitimates, in Connecticut, Virginia, Ohio, Indiana, Missouri, Illinois, Tennessee, North Carolina and Georgia. 2 Kent's Com., 212.

An illegitimate child can purchase by his acquired name; but can take nothing, unless by that name which he has acquired by reputation: By that he can be grantee, or devisee. (a) If an estate be devised to the eldest son of J. S. and he has a bastard son, who is his eldest son, he cannot take; neither could he take, if J. S. had no other son, if it had been devised to him by a name that he had acquired by reputation, with additional designation of the son of J. S.: it would not have prevented the devise from taking effect. A bastard cannot take by the designation of child or issue of such a person. (b) If a contingent remainder be limited to the eldest son of J. S., legitimate or illegitimate, J. S. having no legitimate son, yet a bastard, though the eldest son, cannot take; for the remainder-man, in such case, must take at his birth; (c) and at that time, he has not acquired the reputation of the * son of J. S. This cannot be obtained but by the [*276] continuance of time.

It is said, that such a limitation, to the eldest son of a woman, is good; for that, at the birth, he acquires a reputation of being her son. But such limitation of a contingent remainder, must be *potentia propinqua*; whereas the possibility of a woman's having a bastard, is *potentia remotissima*. The opinions in the books differ; but I apprehend the rule alluded to is decisive of the question. In opposition to this doctrine, we find it laid down in Moore, 10, that a devise, by mother or father, to his or her children, of goods, will entitle bastard children to take. I cannot conceive that this idea is admissible by the common law. It is not strange, that, in bequests of personal property, which fall within the jurisdiction of the ecclesiastical courts, we should find an inclination to adopt the rules of the civil law, for which they always have had a predilection: but I discover no inclination in the courts of common law, to vary from the maxim, that a bastard is *filius nullius*, and all its necessary consequences. (d) This maxim is the foundation of the rule, that the place of the birth of a bastard, is the place of his settlement. In other cases, the settlement of the father, and, as the case may be, the settlement of the mother, is the settlement of their children; for, in the view

(a) Co. Lit., 3; Pow. on Dev., 312, 333.

(b) Co. Lit., 3; 6 Co., 65.

(c) Co. Lit., 3; Cro. El., 570; 1 Pow., 539.

(d) Salk., 429; 1 Bl. Com., 323, 451.

of the law, such child has neither father nor mother, from whom there can be any derivative settlement.

In Connecticut, the Superior Court has decided that the settlement of the mother is the settlement of the illegitimate child. To the common-law rule there are exceptions. If the mother be sent from one parish to another to a jail, which is in another parish, and there an illegitimate child is born of her body, the child's settlement will be in the parish from which the mother was sent. (a) If any fraud be practised by a parish, in [*277] sending a woman pregnant with a bastard child into another parish, or procuring her to go there, that her children may be born in another parish, such child, when born, is settled in the parish from which the mother was sent. If a woman have a bastard child born in a parish, under such circumstances as fall under the description of a traveling beggar, she may be apprehended and sent back to her place of settlement, and that shall be the settlement of such child; but if she was settled in one parish, and residing in another *bona fide*, and there has a bastard child, the place in which the child was born is the place of its settlement. Whilst a pauper illegitimate child is, during infancy, with its mother for nurture, in a parish where it was not born, it must be supported where it was born. Doug., 7. The maxim so often alluded to does not hold in cases of marriages within the Levitical degrees, and also in those cases where the consent of parents is necessary to contract marriages. It seems the consent of the mother of an illegitimate child is necessary. The subject of marriage has always been very much under the control of the ecclesiastical courts, who are governed by the principles of the civil law, whence this doctrine has been transplanted into the English system of jurisprudence. (1)

(a) 1 Bl. Com., 480; Salk., 121.

(1) In Vermont, under the statute of 1801, an illegitimate child, living in a town other than the place of its birth, with its mother, until four years of age, did not gain a settlement by residence, though not warned out. *Manchester v. Springfield*, 15 Vt. Rep., 332. But now, by the statute of 1839, illegitimate children follow and have the place of settlement of their mother. In Pennsylvania, it seems that a bastard's settlement is at the place of his birth, except when the mother is removed from one place to another, by collusion; or when the child is born pending

In England, the putative father, and the mother, by certain statutes, are bound to maintain the illegitimate child: compulsory means are adopted against them both. See the statutes of Elizabeth and George II on this subject. The mother, in that country, has no power to compel the father to support the child; but this is done by the parish officer. In Connecticut, a statute puts it into the power of the mother to compel the father to assist her in maintaining the child. This is effected by *a suit founded upon that statute, which is *sui generis*. The principle on which it proceeds is, to compel both parents to support the child equally; and the judgment of the court, assessing a sum against the putative father, is in conformity to that idea. The support furnished by the father is for four years, and one-half of the childbed expenses. When a woman is pregnant with a child which will be a bastard when born, she presents a complaint to some magistrate, in which she charges some person, on oath, with being the father of the child: on this a warrant issues, as in criminal cases, to bring such person before the magistrate forthwith, to be examined respecting the aforesaid charge. The object of the suit is wholly civil; but the proceedings are altogether in a criminal dress. The magistrate proceeds to an inquiry into the facts; and if he judges that there was no ground for the complaint, he dismisses the person charged. If he believe that the putative father ought to be tried, he binds him over to the county court of the county in which the complainant lives; which court has final jurisdiction in the case. (1)

an order of removal appealed from; or while the mother is in actual custody of the law. *Philadelphia v. Bristol*, 6 Serg. & Rawle, 565. In Massachusetts, also, they follow and have the settlement of the mother. *Chelsea v. Malden*, 4 Mass. Rep., 131; *Peterham v. Dana*, 12 id., 429; *Andover v. Canton*, 13 id., 547; *Newton v. Braintree*, 14 id., 382.

And so in New York every bastard is deemed to be settled in the town or city of the last legal settlement of its mother. *Canajoharie v. Johnstown*, 17 John., 41. And where the mother has no legal settlement, the child must be adjudged to be settled where it is born. *Wyncoop v. Overseers of New York*, 3 John., 15.

(1) A decision of the justices, that the person charged is not the father of the child, is conclusive, and no appeal lies by the overseers of the poor, and no new proceedings can be had against him. *People v. Thompson*, 19 Wend., 154.

The magistrate has no right to decide the point betwixt the parties, but is a court of inquiry, like a grand jury. At the trial of the case, both at the time of inquiry before the magistrate, and on the trial before the court, the complainant is a witness from necessity, although she is interested in the events of the prosecution. The testimony of the complainant is not conclusive; but it turns the burden of disproving the charge upon the defendant, which he may do by any kind of evidence that would be admissible in other cases. The process, it has been observed, is criminal; yet depositions which, by the law of Connecticut, are admissible in civil cases, but not in criminal, are admissible in trials of this kind. From the language of our statute (which [*279] see), it would * be natural to conclude that the complaint before the magistrate ought to be made before the birth of the child; but it has been settled by the court that a complaint may be made after the birth. (1) This gives the complainant, who may be at a loss who was the father of the child, an opportunity to make her charge with more precision than if she were obliged to complain before the birth; an advantage given her, that the statutes never contemplated. By the statute, it is an indispensable requisite, to entitle her to any aid, that she make discovery of the father at the time of her travail: unless this be done, she must fail of a recovery of anything to aid her in the support of the child. (2) No evidence, not even the confession of the man whom she charges, can supply the want of it. This has always been considered as a proper and salutary check upon the complainant. She must also have continued constant in her charges, both in and out of court. When judgment is rendered in her favor, it is for the whole sum that the court assesses for the four years: this sum is divided into sixteen equal

(1) It is not indispensable that she make her complaint before a magistrate prior to the birth of the child. *Sweet v. Stubbs*, 33 Maine, 481.

(2) In order to entitle the complainant to testify for herself, it must be proved by other evidence that, at the time of her travail, she accused the respondent as the father of the child. Such accusation is too late, if not made until the child has been expelled from the body of the mother, though made before the connecting cord is severed and before the child has breathed. *Blake v. Jenkins*, 35 Me., 433.

parts only; the first also includes in it the one-half of the childbed expenses; an execution issues quarterly for a sixteenth part of the whole sum only; the first execution includes also the childbed expenses, as before stated. If the child dies before the expiration of four years, in such case the executions are stayed. At the time that the judgment is rendered in favor of the woman, there is also a judgment of the court that the putative father find securities to pay the sum assessed, and also to secure the town against maintaining the child if ever it should become a pauper. Whenever the expense of maintenance is increased beyond what is usual, by sickness, or any accident, upon application to the court there will be a further assessment; and this will be divided into as * many parts as remain, and be added to the quarterly executions as they issue. When [*280] the putative father is arrested, he finds surety to appear at court, and abide the final judgment; and this surety is holden one year after the last execution issues. If the child be not born at the time of the session of the court, the court continues the case, and takes a renewal of the bond. If the mother of the illegitimate child die in a state of pregnancy; or the child be dead when born; or the mother suffer an abortion; it is said that the putative father is discharged. I see no reason why he should be discharged from his moiety of the childbed expenses, when the child is born dead. If the mother marry in this situation, it is said that the putative father is discharged from maintaining the child, and that the husband could not be joined with his wife in prosecuting the claims against the putative father. The principle on which this doctrine is founded, I do not discover. If, indeed, the old law were in force, that a man, who married a woman pregnant by another man, was indeed the father of the child with which she was pregnant, such husband ought to maintain such child without aid from any person; for all parents are, by common law, bound to maintain their minor children: But it is now perfectly understood that such proof may be procured as will infallibly prove that a child born in wedlock may be a bastard child; and if the putative father be not obliged to be at one moiety of the expense, how is the child to be supported? The

mother, by law, is to be at one-half of the expense. The husband is obliged to perform the duties of the wife, but nothing more. It follows, of course, that the putative father must be obliged to furnish one-half of the support. There is as much reason why the putative father should support his child in this case, as in any other case; and I can conceive of *no [*281] technical difficulty that should prevent the husband from joining with the wife from prosecuting their claim, any more than any other. Before the marriage she was vested with a right to have a sum of money assessed against the putative father; and, upon marriage, this right, with all others of a personal nature, are placed in the power of the husband to vindicate in a suit in his and the wife's name.

If the mother of a bastard do not prosecute the father, the selectmen of the town may, for the purpose of compelling him to give security to the town that the child shall not be chargeable to the town. On this suit, no sum is assessed for the support of the child. The object of the law is to procure indemnity, as aforesaid, for the town. If the mother have begun a prosecution, and withdraw it, the selectmen may enter their names, and thereby procure security to the town. A question has been agitated before the courts in this State, whether, on the prosecution by the selectmen, the mother was compellable to be a witness. (1) It has been settled by the Supreme Court of Errors that she is. It was urged, in that case, that she could not be compelled to criminate herself. That argument is without weight. The fact that she had a child had already criminated her; and nothing that she could say would add to it. On that ground, I have no doubt of the correctness of the decision of the court; but I very much doubt of the propriety of this compulsion. It may often happen that this may prove a source of domestic discord. The detecting of a husband or a father on such an occasion may embitter the lives of him and his wife: it may prove the severest mortification to, and the disgrace of, an ami-

(1) The justice may commit a mother for refusing to disclose who is the father, under the statute, although the authority is not clearly given, either expressly or by implication. *Scott v. Ely*, 4 Wend., 555.

able family, to have the shame of their father published to the world: it is involving the innocent and virtuous in all the consequences of the guilt * of another; not for the purpose of [*282] establishing the certain rights of others, but merely to preserve the possible contingent rights of a town or parish.

What the mother has said before the magistrate, on examination under oath, is admissible after her death, to support the suit by the selectmen. The trial of these cases is by the court, without the intervention of a jury. This arises from the particular phraseology of the statute. (1)

(1) Statute provisions, for the protection and support of bastard children, exist in most, if not all, of the United States. The following brief summary will serve to show the mode of procedure in some of them, to ensure to the illegitimate the same protection which would have been his due if born within the pale of lawful matrimony.

In Vermont, the manner of charging the putative father of a bastard child with its maintenance, does not differ materially from that of the State of Connecticut. The mother, either before or after delivery, makes complaint, in writing, and on oath, before a magistrate, charging the putative father with having gotten her with child; warrant is issued thereon, the person charged is apprehended, and compelled to enter into bonds for his appearance at the higher court. In that court, the cause is tried upon the issue of not guilty, and if the putative father is adjudged guilty, the court charges him with the support of the child in such proportion as it thinks proper, and also with the payment of a just proportion of the expenses already accrued. The proceeding, before the magistrate, is wholly *ex parte*, nor can the mother be put upon her oath after having sworn to the original complaint, until one month after her delivery. If the mother neglects to proceed against the putative father, and if the child is likely to become chargeable as a pauper, the overseer of the poor may conduct the prosecution; and, after he has assumed its control, no compromise with the mother will be binding. The mother is a competent witness, unless rendered incompetent by a conviction for some crime, which would, by law, disqualify her from being a witness in any other cause. She may, therefore, testify to the confessions of the putative father. *Mather v. Clark*, 2 Aik. Vt. Rep., 209. Testimony is not admissible to show that she was reputed to be a common prostitute, at the time the child was begotten. *Morse v. Pineo*, 4 Vt. Rep., 281; *Spears v. Forrest*, 15 Vt. Rep., 435.

A married woman cannot sustain a complaint for bastardy, for the purpose of compelling the father of a child, begotten and born during coverture, to contribute to its support, even by showing a total want of access of the husband, such a case not being provided for by the statute. *Gaffery v. Austin*, 8 Vt. Rep., 70. But such prosecution may be sustained by the overseer of the poor in the name of the mother, though the mother, after the birth of the child, was married, and at the

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* CHAPTER IX.

OF THE LIABILITY OF PARENTS TO SUPPORT THEIR CHILDREN, AFTER THEY ARE OF FULL AGE, IN THE EVENT OF THEIR BECOMING PAUPERS. OF THE LIABILITY OF CHILDREN, AFTER THEY ARE OF FULL AGE, TO SUPPORT THEIR PARENTS, IN THE EVENT OF THEIR BECOMING PAUPERS. OF THE NON-LIABILITY OF THE HUSBAND OF A DAUGHTER, ALTHOUGH THE DAUGHTER WOULD BE LIABLE IF SHE WAS UNMARRIED. OF THE PARENT'S RIGHT TO GOVERN, AND BEING LIABLE TO THE CHILD IN AN ACTION FOR IMMODERATE CORRECTION, AND WHAT CORRECTION OUGHT TO BE CONSIDERED IMMODERATE.

By the common law, it is the duty of parents to support their minor children. 1 Bl. Com., 446. This duty is founded on the law of nature. Whoever has been the instrument of giving life to a being incapable of supporting itself, is bound by the law of morality to support such being during such incapacity. *Id.*

time of the prosecution, was a *feme covert*; her husband joining with her in the written request for a warrant. *Sisco v. Harmon*, 9 Vt. Rep., 129.

In New York, the mother or putative father of an illegitimate is chargeable with the support of it in such a way as two justices of the county shall think meet; and the goods, chattels, and real estate of the parents are seizable for the support of such child, if the parents have absconded. The reputed father is liable to arrest and imprisonment, until he gives security to indemnify the town chargeable with the maintenance of the child. 2 R. S., 5th ed., p. 906.

In Ohio, this duty of compelling the putative father to support the illegitimate child, devolves upon the common pleas. Stat. Ohio, 1831. And it must appear in the complaint that the mother is an unmarried woman, and a resident of the State of Ohio. *Edwards v. Knight*, 8 Ohio R., 375.

In Indiana, the complaint is in the name of the state, under the oath of the mother, and filed in the circuit court. *Woodkirk v. Williams*, 1 Blackf. Rep., 111; *Dickerson v. Gray*, 2 *ibid.*, 230. If the respondent does not appear and answer the complaint, the court is empowered to proceed in his absence; and, after issue found against him, may render judgment against him for such sum or sums of money, as it may deem proper, for the support and maintenance of the child, and for costs; but not for damages for the seduction of the mother, or expenses of her lying-in,—they being the objects of a different kind of prosecution. *Allen v. The State*, 4 Blackf., 124. It must appear, in the complaint, that the mother was unmarried, and a resident of the state. *Smith v. The State*, 4 Blackf. Rep., 188. But the

Ray., 500. When such incapacity ceases, the obligation is at an end. To prevent uncertainty on this subject, the law has fixed the time of minority until the child arrives at the age of 21 years. It is then the absolute duty of the parent to maintain his child until he is 21 years old. In ordinary cases, the incapacity of the minor has then ceased in fact, as well as in presumption of law; and with it ceases all moral obligations on the part of the parent, unless the child is, in fact, unable to maintain himself at the expiration of that period. During this period of infancy, the parent can never discharge himself from his obligation to support the child, by showing that the child was able to support himself; but he * may do it by showing his own inability to support him. (a) If the child be an adult, [*284] the parent is liable for his support, if he be unable to support

(a) 3 Atk., 390; 1 Ves., 160; 1 Bl. Com., 448.

statute, giving the right to the mother to make complaint, has no reference to the place where the child was born. *Cooper v. The State*, 4 Blackf., 316.

In Illinois, nearly the same provisions exist. The statute, authorizing proceedings in case of bastardy, was intended to enable the mother of an illegitimate to compel the father to contribute to its support. When he acknowledges his obligation, and voluntarily stipulates to perform that which by law he may be compelled to do, the ends of justice are attained by enforcing his undertaking. *Coleman v. Frum*, 3 Scammon's Rep., 380.

The proceedings authorized by statute, in Massachusetts, are quite analogous to those in the State of Vermont. An examination of the following cases will afford the student an insight into the method of proceeding and liability of the father, in this state. *Johnson v. Randall*, 7 Mass. Rep., 340; *Merrill v. Prince*, 7 *ibid.*, 396; *Commonwealth v. Clark*, 2 *ibid.*, 156; *Commonwealth v. Cole*, 5 *ibid.*, 517; *Woodcock v. Walker*, 14 *ibid.*, 386.

In Pennsylvania, the practice is for the court, on a conviction of bastardy, to make an allowance for lying-in expenses, and to direct the payment of a gross sum for the support of the child, from its birth to the time of rendering judgment; and when the person who has borne these expenses is dead, the money may be awarded to his representatives. *Sheffer v. Rempubliam*, 3 Yeates' Rep., 39. Notwithstanding a pardon of the crime of adultery, on a conviction for adultery and bastardy, the court may proceed to make an order for the maintenance of the bastard child. *Duncan v. The Commonwealth*, 4 Serg. & Rawle, 449.

The mother of a bastard has a right to the control and custody of it, as against the putative father, and is bound to maintain it as its natural guardian. 2 Kent's Com., 178. And if the father obtains and maintains the custody of the child, an action of false imprisonment will lie. *Robaline v. Armstrong*, 15 Barb., 247; *People v. Kling*, 6 *ibid.*, 366.

himself; but in this case the parent may discharge himself from all liability to support his child, by showing that the child is able to support himself. This duty of supporting adult children is, in England, enforced by a statute of Eliz.; and similar statutes have been enacted in most, if not all, the states in the Union. The statute of this state makes it the duty of parents to support their children; and grandparents, their grandchildren; children, their parents; and grandchildren, their grandparents. This statute imposes on such relatives obligations unknown to the common law. In the construction of our statutes, I have understood, that when a parent is able to support his pauper child, no aid is to be called for from their grandparent; and so, too, when the child is able to support the parent, no aid is to be required of the grandchild. The English statute does not include grandchildren. All, both male and female, with an exception hereafter mentioned, are bound to support their parents, if they be of ability; and they will be assessed, where there are a number able, in proportion to their ability, without any reference to the property which they have received from their parents. One child may have received a good estate from his parent, and now be poor; whilst another, who has received nothing from his parent, may be in affluent circumstances. The ability to support is the only thing which governs in the quantum of assessment; and I apprehend this will not be in exact proportion to the property owned. One may possess an estate of £1,000; but his numerous family prevents his increasing his estate; whilst another, with the same estate, unincumbered with the expenses of a numerous family, is of greater ability to support his parent.

[285*] (1) When a man marries a wife, having * children, the husband takes upon him, during coverture, all the obligations that lay on his wife; he took her *cum onere*. 1 Bl. Com., 448. If, then, she were able to maintain her children, when he

(1) This liability of the father to support his adult child is created by statute in Vermont. Rev. Stat. Vt., p. 104. Nor does the liability stop at the father. The kindred of any poor person, in the line of father or grandfather, mother or grandmother, children or grandchildren, by consanguinity, living within the state, and being of sufficient ability, are bound to support such pauper, according to their re-

married her, he is bound to maintain her children: if she were not able, he is not bound; for it is not a natural duty that he

spective ability. The county courts have power to assess the expenses of such support, in an equitable proportion, upon the kindred. In New York, similar provisions exist.

"The father, mother and children, who are of sufficient ability, of any poor person who is blind, old, lame, impotent or decrepit, so as to be unable to work to maintain himself, shall, at their own charge, relieve and maintain such poor person in such manner as shall be approved by the overseers of the poor of the town where such poor person may be." 3 R. S. (N. Y.), 5th ed., p. 836, sec. 1. And such relative "shall perform that duty in the following order: The father shall be first required to maintain such poor person; if there be none, or he be not of sufficient ability, then, the children of such poor person; if there be none, or they be not of sufficient ability, then the mother." *Ibid.*, sec. 2. And "whenever the father, or mother being a widow, or living separate from her husband, shall abscond from their children, or a husband from his wife, leaving any of them chargeable, or likely to become chargeable, upon the public for their support, the overseers of the poor of the town, where such wife or children may be, may apply to any two justices of the peace of any county in which any estate, real or personal, of the said father, mother or husband may be situated, for a warrant to seize the same." 2 R. S. (N. Y.), 5th ed., p. 837, sec. 8. And such property is liable to sequestration, and the proceeds will be applied to the maintenance of the children.

In Massachusetts, the provisions of 43 Eliz., have been enacted; limited, however, to parents and children. Rev. Stat. Mass., 1835. In several of the other states this statute has been enacted in all its provisions. Stat. Conn., 1784, p. 98, and of 1838, p. 353; Stat. of S. C., 1712; 2 Bailey's Rep., 320; 4 N. H. Rep., 162.

There is no obligation at common law by which a child can be compelled to support an infirm and indigent parent, but the obligation is created solely by statute; and therefore a promise from the child to pay for necessities furnished without his request, to his indigent parent, is not implied by law. *Edwards v. Davis*, 16 John., 281. The natural and moral obligation of a child to support an indigent parent can be enforced only in the mode pointed out by the act for the relief and settlement of the poor. *Ibid.*

As a general rule, as between the father and mother, the obligation to support the child rests primarily upon the father, but this rule is modified more or less by the peculiar circumstances of each case. The award of the care and custody of the child to the mother in divorce suit, is presumed to carry with it the obligation to support the child, in the absence of evidence to the contrary: or at least to relieve the father from the obligation to furnish such support upon the call of the mother. The omission of the father to support, or the mother's support of the child in the absence and during the non-residence of the father is not such a refusal to support as obliges the father to refund the expenses incurred by the mother. *Burritt v. Burritt*, 29 Barb., 124; *Finch v. Finch*, 22 Conn., 411.

should support the offspring of another man; and by the law of Baron and Femme, when coverture ceases, his liabilities on account of his wife cease also.

I know that it has been a received opinion, that a husband in Connecticut is obliged to support his wife's children by a former husband, if he be of ability to do it, whether she was able at the time of the marriage or not, to support her children. Such an opinion is destructive of the symmetry of the law, as it respects the liability of the husband to perform the duties of the wife. It is opposed to the construction of the English statute, which had received a construction long before our statute was enacted. So that it is a fair presumption, that our legislature, when they enacted our statute, were perfectly satisfied with the construction given to the English statute. If they had intended to have made so important a variation, it is but reasonable to suppose that they would have expressed it in language that could not be mistaken. (1)

(1) The law upon this subject is now understood to be this: that if the husband take the wife's child by a former marriage, into his family, he is considered as standing *in loco parentis*, and becomes subject to the same duties towards him, as towards his other children, as long as the child remains in his family; for by the act of taking him in, he holds him out to the world as a part of his family. *Stone v. Carr*, 3 Esp. Cas., 1; Lord ELLENBOROUGH, in *Cooper v. Martin*, 4 East, 82; *Sharp v. Crosey*, 11 Barb., 224; *Williams v. Hutchinson*, 3 Comst., 312. The construction given to the statute of 43 Eliz., it is true, did not make him liable; for that applied only to relations by blood. *Tubb v. Harrison*, 4 Term Rep., 118. And under this statute, it has been held that the husband is not liable for the expense of the maintenance of his wife's mother. *Gay v. Ballou*, 4 Wend. Rep., 403. The statute of 43 Eliz. has since been altered, in England, by statutes 4 and 5 W. IV. c. 76, sec. 57, by which the person who marries a woman, the mother of legitimate or illegitimate children, becomes liable to maintain them as a part of his family. It is the opinion of Chancellor KENT, that if the wife has separate property, a court of chancery would, in a proper case, make an order charging that property with the necessary support of her children and parents. 2 Kent's Com., 192.

A husband is not liable to support a child of his wife by a former husband, nor is he entitled to claim services from such child. *Williams v. Hutchinson*, 5 Barb., 122. Affirmed in 3 Comst., 312. Where a husband received his wife's minor child into his family as child and not as a servant; held, that, there being no express contract to pay wages, they could not be collected by the female from her father-in-law. *Dantz v. Frey*, 19 Penn., 366; *Williams v. Hutchinson*, *supra*. It will not be presumed, in the absence of evidence to the contrary, that kid gloves, cologne, fiddle

It has been decided, both by the English and our courts, that a husband is not bound to support the wife's parent or grand-

strings, bridles and spurs, walking canes, powder flasks and caps, a silk cravat and a silk and linen coat, which constitute the bulk of a bill of particulars, are such articles as will bind a parent upon any implied or express contract to pay for necessities furnished to his minor child. *Leffle v. Sugg*, 15 Ark., 137. In order to charge a parent with supplies furnished to his minor child, without his direction, some clear and palpable omission of duty on the part of the parent must be shown. *Townsend v. Burnham*, 33 N. H., 270; *Clinton v. Rowland*, 24 Barb., 634. The remedy to compel a parent to furnish necessities for his infant children, is not by a petition to the court of chancery. The performance of that duty must be enforced by a proceeding under the statute, by application to the general sessions for an order upon the parent for the support of his child. In the matter of *Ryder*, 11 Paige Ch., 185. After the death of the father, the mother was held not to be entitled to the services of the minor child, nor liable for its support. *Bartlett v. Richtmyer*, 4 Comst., 46; *E. R. v. E. C. B.*, 28 Barb., 300; *Commonwealth v. Murray*, 4 Binney, 487; 2 Kent's Com., 205.

Where a father had made a contract with his minor son, by which, for a consideration, he agreed to give his son liberty to act for himself and not to claim his services, and had made publication that he would not thereafter pay any debts of the son, and the son returned to his father's house sick, and the plaintiff's charges were for necessary medical services rendered the son upon the credit of the father, and in good faith charged to him at the time; and the father knew of the services being rendered, and did not object; it was held, that the law implies a promise to pay on the part of the father, on the ground that while the minor remained a part of the family, and received necessities with the knowledge of the father, and without objection on his part, it was the same as though he had received them himself, or his wife had received them. *Swain v. Tyler*, 26 Vt. Rep., 9. But see, *McClosky v. Cyphert*, 27 Penn., 220. Held, that, where a parent is willing to support his infant child, and a relative, without his request but with his assent, receives the child into his family, and supports it as a child of his own, no agreement of the father to pay for such support can be implied. *Chilcott v. Trimble*, 13 Barb., 502. And so, where the infant left his father's house in disobedience of his express commands, and went to live with the plaintiff under contract that he should remain till he was 21 years of age. *Raymond v. Loyl*, 10 Barb., 483. The father is not bound to support an illegitimate child. *Hiram v. Pierce*, 45 Maine, 367. Where a parent goes to live with a child, the law implies no promise on his part to pay for boarding or necessities furnished by the child. There can, in such cases, be no recovery without an express contract. *Lynn v. Lynn*, 29 Penn., 369; *Cantine v. Philips*, 5 Harring. (Del.), 428; *Swartz v. Hazlett*, 8 Cal., 118; *Gillet v. Camp*, 27 Mia. (6 Jones), 541. And the same rule obtains when the son goes to live with the parent. *Seavey v. Seavey*, 37 N. H., 125. Where a son continues in the employ of his father after his majority, the law implies no contract on the part of the father to pay the son for his services. *Zebe v. Miller*, 16 Penn., 488; *Hertzog v. Hertzog*, 29 Id., 465; *Dye v. Kerr*, 15 Barb., 444. But see, *Way's adm'r v. Estate of Way*, 27 Vt. Rep., 625.

parent. (a) This is opposed to general principles; for his wife was liable to support them before marriage, and, of course, upon general principles, he would be obliged to support them after marriage. But the general principle is made to yield to the supposed superior strength of a principle of domestic policy which governs in this case, that family discord may be prevented. In Connecticut, the mode of enforcing this duty is by an application [*286] to the county court, to call all parties * before them, inquire, and assess the sum that is to be paid by each. This memorial may be made by any relatives concerned, or by the selectmen of the town, who, by our law, are overseers of the poor, or, indeed, by any neighbor, when this duty is neglected by all who ought to perform it. When the sum is assessed, security is given to abide the order of the court, which is to pay quarterly. If security be not given, the court will issue quarterly executions against each of the parties in favor of the applicant, who becomes trustee of what he collects for the benefit of those on whose account the application was made. When the children are minors, and the parents will not support them, an action at common law lies against such parents by any person who supplies the children with necessaries. So, too, where one child, among several, supports his pauper parents, without application to the court for an assessment, he may maintain an action against each of his brethren, or sisters, who refuse to bear their proportion of the support.

Protection is, also, a duty of parents towards their children. This duty is enjoined by municipal law no further than what respects their obligation to support them. It is allowed, in some cases, that the parent may maintain his child in a lawsuit. All persons are forbidden to do this for a stranger. The parent may justify a battery in favor of a child; that is, he may do all in defense of his child, in such case, as the child may do. A stranger may do nothing more than what is necessary to prevent others from fighting; but the parent may take sides with the child.

Education of children to some useful employment; the instruction of them in reading their own language, so as to be able to

(a) 2 Buls., 345; Stra., 190.

read with propriety, that they may be able, for themselves, to search the scriptures of truth, * and from them learn the revealed will of God, is a duty which is not enforced by [*287] the law of England any further than that overseers of the poor have, by statute, a power to bind out the children of paupers to masters where they may receive a proper education. By the laws of Connecticut, all parents are bound to teach their children to read the English language well; and the law concerning capital offenses. Nothing more is intended by this clause than that they should learn what offenses are capital. If they have not sufficient ability to do this, they are obliged to teach their children some orthodox catechism. Whatever might have been meant by our ancestors who enacted the law, by the terms orthodox catechism it is now understood to be some catechism approved by that denomination of Christians to which the parents belong; and if the parents will not teach their children in such manner, the selectmen of the town are enjoined to take their children from their parents and bind them out to proper masters where they will be educated to some useful employment and will be taught to read and write, and the rules of arithmetic so far as is necessary to transact ordinary business. (1) Males are to be bound out until they are twenty-one years of age, and females until eighteen years of age. This law has, by some, been branded as tyrannical, and as an infringement of parental rights. It is not the object of this work to enter into any defense of any particular law, but I have no doubt that this law has produced very astonish-

(1) The common law has left it almost optional with the parent to discharge this duty toward his offspring or not; though, perhaps, none of its laxities has been less abused in the United States, and especially England, than this. In some of the European States, his duty to educate his child has been made a matter of legal compulsion — a system which, though intended for the good of the child, is not productive of as beneficial results as might be anticipated. In New England, poverty debars no one from the advantages of a common-school education; and the general information and industrious habits of her poorer classes — the direct results of a liberal common-school policy — present a striking contrast to the ignorance of the lower classes of foreign immigrants which are annually thrown in upon her. In these States, especially, almost every step of legislative action with regard to common schools has been characterized by some decided improvement.

For a full account of the measures taken by the several State governments for the advancement of popular education, see 2 Kent's Com., 195.

ing effects; and to this is to be attributed that general knowledge of reading and writing so observable among the people of this State. For twenty-seven years of my life I was in the practice of the law. During this period, in all the business which I transacted, I never found but one person that could not write and was obliged to make his mark.

[*288] The parent has a * right to govern his minor child; and, as incident to this, he must have power to correct him. The maxim is, that he has power to chastise him moderately. The exercise of this power must be, in a great measure, discretionary. He may so chastise his child as to be liable in an action by the child against him for a battery. The child has rights which the law will protect against the brutality of a barbarous parent. I apprehend, however, it is a point of some difficulty to determine, with exact precision, when a parent has exceeded the bounds of moderation. That correction which will be considered by some triers as unreasonable, will be viewed by others as perfectly reasonable. What may be considered by some a venial folly, to which none, or very little, correction ought to be applied, by others will be considered as an offense that requires very severe treatment. The parent is bound to correct a child so as to prevent him from becoming the victim of vicious habits, and thereby proving a nuisance to the community. The true ground on which this ought to be placed, I apprehend, is, that the parent ought to be considered as acting in a judicial capacity when he corrects, and, of course, not liable for errors of opinion; and although the punishment should appear to the triers to be unreasonably severe, and in no measure proportioned to the offense, yet, if it should also appear that the parent acted conscientiously, and from motives of duty, no verdict ought to be found against him. But when the punishment is, in their opinion, thus unreasonable, and it appears that the parent acted, *malò animò*, from wicked motives, under the influence of an unsocial heart, he ought to be liable to damages. For error of opinion, he ought to be excused; but for malice of heart, he must not be shielded from the just claims of the child. Whether there was malice * may be collected [*289] from the circumstances attending the punishment. The

instrument used, the time when, the place where, the temper of heart exhibited at the time, may all unite in demonstrating what the motives were which influenced the parent. These observations are equally applicable to the case of a schoolmaster, or to any one who acts in *loco parentis*. Bl. Com., 458. (1)

* CHAPTER X.

[*290]

OF THE PARENT'S CONSENT TO THE MARRIAGE OF AN INFANT CHILD.

OF THE FATHER'S CONTROL OVER THE ESTATE OF HIS CHILD.
 OF THE FATHER'S RIGHT TO THE SERVICES OF THE CHILD, UNTIL THE CHILD IS TWENTY-ONE YEARS OLD. OF THE FATHER'S RIGHT OF ACTION, WHEN HIS INFANT CHILD IS BEATEN. OF THE INFANT'S RIGHT OF ACTION IN THAT CASE. OF THE PARENT'S RIGHT OF ACTION, WHEN A DAUGHTER HAS BEEN DEBAUCHED. OF THE FATHER'S RIGHT OF ACTION, WHEN AN INFANT CHILD IS TAKEN AWAY BY FORCE.

WHEN the minor child marries, the father has a right to withhold his consent; and a marriage without his consent, by an English statute, is absolutely void. (a) In Connecticut, the law prohibits the marriage of the minor, without the father's consent, and subjects the person who joins them in marriage, to a penalty; but such marriage is valid, if the persons married, are

(a) Bl. Com., 262.

(1) In ancient times, among the Greeks and Romans, the power of the father over his child was almost absolute. Inst., 1, 9; Law of the Twelve Tables. The same right of correction once was possessed by a husband with regard to his wife; but every advance in civilization has been characterized by a limitation of some of these rights, until, at the present time, the right of the husband to chastise his wife is gone, and he is as much punishable for an assault and battery upon her as upon any other person. This parental power over the offspring, also, has been reduced to the right of inflicting moderate correction, under the exercise of a sound discretion. It is also held that a schoolmaster may moderately correct his pupil. *State v. Pendegrass*, 2 Deb. & Bat., 365.

of age to contract marriage. (1) The father, as parent, has no control over the estate of his minor child; but he acts as guardian, and, in that character, has the management of it; (a) and, like him, must account with the minor, when he becomes of age, and may be compelled to account before, and is liable to removal. A minor can acquire property in any way, independent of his father, except by his services, as by gift, delivery, or any purchase; for, in this case, the contract is not void. The father is entitled to the services of his minor child, and to all that such child earns by his labor. He has the same right, in this respect, that the master has to the services of his apprentice; and [*291] * the father can no more give to the child the avails of his service, to the prejudice of his creditors, than he can any other property. (2)

(a) Bl. Com., 452.

(1) In several of the States, this is made the subject of statute regulation. The first act of legislation upon it, is the statute of 4 Geo. IV, c. 76, which rendered the marriage of a minor, without the consent of parents, void. In Maine, Massachusetts, Connecticut and Vermont, a penalty is inflicted upon the officer who shall join an infant in the bonds of matrimony, without the consent of his parents or guardian; but though an officer is subjected to this penalty, still, it is presumed that such marriage would be valid. *Ligonia v. Buxton*, 2 Greenleaf's Rep., 102; *Milford v. Worcester*, 7 Mass. Rep., 48; Mass. Rev. Stat. of 1835; Stat. Conn., 1838, p. 412; Rev. Stat. Vt., 1839; *Ellis v. Hull*, 2 Aik. Vt. Rep., 41. In Indiana, marriages are solemnized under a license from the clerk of the circuit court; and if either of the parties are minors, that is, the male under twenty-one, and the female under eighteen, the license must not be granted without the consent of the parent or guardian. Rev. Stat. Ind., 1838, p. 412. In New Jersey, New Hampshire, Pennsylvania and Kentucky, also, it is said to be the acknowledged doctrine, that the marriage in such a case is valid, though the person solemnizing it is liable to the penalty. 2 Kent's Com., 90.

(2) The parent is entitled to the services of his infant child. *Galbraith v. Green*, 4 Serg. and Rawle, 207; *Jennison v. Graves*, 2 Blackf. Ind. Rep., 449. And the relation of parent and child is so far relaxed, that the father may, at any time, relinquish his claim for such services; and when he does, the profits of the infant's labor belong to the infant himself. *Jennison v. Graves*, 2 Blackf. Rep., 449; *Tillotson v. McOrilla*, 11 Vt. Rep., 477. And the relinquishment of such right by the father may be proved by parol. *Chase v. Smith*, 5th Vt. Rep., 556. The infant after having thus purchased his time, is entitled to his own earnings, as against the creditors of his father. *Chase v. Elkins*, 2 Vt. Rep., 290; *Chase v. Smith*, 5 Vt. Rep., 556.

And an emancipation *may be inferred* where the father leaves his child to manage and contract for himself for a number of years. *Canover v. Cooper*, 3 Barb.,

The father is entitled to an action when his minor child is beaten, by means whereof he has lost the services of that child,

115; *Clinton v. York*, 26 Maine, 167; *Stiles v. Granville*, 6 Oush., 458; *Cloud v. Hamilton*, 11 Humph., 104. And emancipation may be inferred from the conduct of the parties. *Dennysville v. Trescott*, 30 Maine (17 Shep.), 470; *Nightingale v. Worthington*, 15 Mass., 272. A father can give his son his time verbally; and the son will be entitled to his subsequent earnings. *Chase v. Smith*, 5 Vt., 556. But the fact, that a minor has agreed with his father, to buy his time for the remainder of his minority, by paying a certain sum therefor, which has not been paid, does not prevent the father from maintaining an action to recover for services performed by the son, under a contract made by him without the father's knowledge. *Cahill v. Patterson*, 30 Vt. Rep., 592. Where a son over 20 years of age, who had been receiving his own wages, though living with his father, went, to California against the wishes, but with the consent of his father, who advanced him money to pay his passage, but neither received his earnings nor made any provision for his support while abroad, it was held, that these facts warranted a finding that it was the understanding, that when the son left his father's control over and liability for him had ceased, and that the father was not liable for necessities furnished him while abroad. *Johnson v. Gibson*, 4 E. D. Smith (New York), 231. One suing, as father of an infant, for the infant's labor, if the relationship is denied by the defendant, must show, that the infant is his legitimate son, and for that purpose must give some evidence of a marriage. That the infant's mother and the plaintiff had both declared that the plaintiff was his father, and the oath of a witness to the same fact, are not sufficient, because consistent with the infant's illegitimacy. *Armstrong v. McDonald*, 10 Barb., 300. In an action by the father for the earnings of the minor child, the measure of damages is what the child earned, not what he could have earned for his father. *Weeks v. Holmes*, 12 Oush., 215. If a minor son abscond from his father's house and enter the service of one, who for his labor furnishes the infant a reasonable support, the parent cannot recover the son's wages without deducting the expense of such support. *Huntoon v. Hazleton*, 20 N. H., 388. And under the act of 1850, ch. 266, of New York, if a minor be in service, unless the parent or guardian, within thirty days after the commencement of the service, notify the employer that he claims the minor's wages, payment to the minor is good. *Clinton v. Rowland*, 24 Barb., 634. Held, in *McClosky v. Cyphert*, 27 Penn., 220, that a minor is bound to render obedience to his father, who may employ him about his own affairs, or hire him out and appropriate his wages, but he is not bound to do so for the benefit of his creditors. Held, also, that the emancipation of the son may be as complete while living under the same roof with his parent, as if they were separated. *Ibid.* But it was held, in *Van Dorn v. Young*, 13 Barb., 286, that the father may make an agreement for the services of his minor child, which will be good against him, so far as his parental authority extends; but he could not bind out his minor child without his consent.

If a parent has relinquished his control over a minor child, he cannot maintain an action against a justice of the peace or a clergyman, to recover the penalty for marrying such minor without the parent's consent or without the publication of banns.

or has been put to expense by means thereof; (a) but, for the immediate injury to the minor, i. e., for the bruises and wounds

(a) 9 Co., 118; Rep. Dig., 645.

Robinson v. English, 34 Penn., 324. A debt due to a minor for his services, after his emancipation, from one who had knowledge of the emancipation, is protected from attachment by the creditors of the father. *Bray v. Wheeler*, 29 Vt., 514. An agreement by the father for the services of his minor child ceases to be binding upon the minor at the death of the father, unless made by indentures of apprenticeship in conformity with the provisions of the statute. *Campbell v. Cooper*, 34 N. H., 49. And if a parent make a contract for the services of his infant child, and the wages are by the agreement to be paid to the child, the child may in his own name maintain an action for the wages due. *Snediker v. Everington*, 3 Dutcher (N. J.), 143. A mother, after the death of her husband, has no authority to assign the services of her minor child for the period of its minority, although by the contract the wages for the services be made payable to the child. The mother is not entitled to the wages of the child. *Pray v. Gorham*, 31 Maine, 240; *Frets v. Brown*, 4 Mass., 675. Work done by a child for his father, after coming of age, does not stand on the footing of work done by a stranger, and services rendered by a son while residing with and supported by his father, without any contract for compensation, cannot be made the foundation of a claim for wages. *Sanders v. Wagonseller*, 19 Penn., 248. Where a father sues for damages resulting from an injury to his child, he can only recover compensation for damages to be measured by the loss of the child's services, and his expenses in nursing and curing him. He cannot recover for his lacerated feelings or his disappointed hopes. The injuries sustained by the child, such as his personal sufferings, the loss of a limb, &c., would be the subject of an action by the child himself. *Penn. R. R. Co. v. Kelly*, 31 Penn., 372. And in case of the death of the child, occasioned by negligence in running R. R. cars, the measure of damages, under the act of April 26th, 1855, of Pennsylvania, is the pecuniary value to the father, of his services during his minority, together with the expenses of care, &c. *Penn. R. R. Co. v. Zebe*, 33 Penn., 318. By the act of 1847 (amended, 1849) of New York, any person who could have maintained an action, if death had not ensued from a wrongful act, neglect or default, can maintain an action and recover damages notwithstanding the death. 3 R. S., 5th ed., p. 539.

But where a parent sues for a negligent injury to his minor child, he cannot recover, if the child's negligence concurred in producing the injury; and can recover only for the loss of service before suit brought, together with reasonable compensation for the expenses incurred and care bestowed during the illness of the child; and cannot recover for prospective loss during the minority, *unless he has declared specially therefor*. *Gilligan v. N. Y. and Harlem R. R. Co.*, 1 E. D. Smith, 453.

The relation of parent and child is established *prima facie*, by evidence that the parties lived together and recognized, by their acts, the existence of such a relation. *Dalton v. Bethlehem*, 20 N. H., 505. A child of from six to seven years of age was run over and killed by one of the defendants' cars; Held, that the question of negligence was properly left to the jury, and that no proof of any pecuniary or special damage to the plaintiff (the administrator of the child), or next of kin, in consequence of the death of the child, was necessary to sustain the action. (See Laws of N. Y., 1847, ch. 450; amended, 1849, ch. 256.) *Oldfield v. N. Y. and Harlem R. R. Co.*, 14 N. Y. (4 Kern.), 310; *Quin v. Moore*, 15 N. Y., 432.

inflicted, the minor alone is entitled, and the damages, when recovered, belong only to the minor. The parent's right of recovery rests upon the idea that he has sustained special damages. He must, therefore, lay his special damage in the declaration, with a *per quod servitium amisit*; (a) and, if he claims on the ground of expense, this must be stated specially. Upon the principle of the right of the father to the service of his minor child, he is entitled to an action if his minor child be enticed away from him. On these principles the action, so often brought by a father when his daughter has been debauched, is founded, viz., the loss of service. But this loss of service is not the rule of damages: it is scarcely an item in the account. The real ground for damages is the disgrace of the family. The loss of service, in many instances, could not be accounted anything; yet the damages will be large, and often, where the least service is performed, the highest damages are given: And in all those actions, the character of the daughter for unchastity, her connection with another man, is allowed to be proved; and, if satisfactorily proved, although it does not lessen the damages for actual loss of service, for that will be the same whether the daughter was, before that time, chaste or unchaste, yet it will render the damages merely nominal. (b) This demonstrates that loss of service is not the real ground of the action; for the service of a daughter, whose character is bad in point of chastity, is of equal worth with that of the most * virtuous. (c)

The slightest degree of service has been holden sufficient to maintain the action, and to recover the heaviest damages. It has been lately holden, that it is not necessary to prove any service: if she lives in her father's family, service is presumed. So, too, it is wholly immaterial whether the daughter is a minor or not, if she live with her father. (d) There is not any necessity, in this case, to show a contract betwixt the father and the daughter respecting services. She shall be considered a servant to her father; and this is sufficient. When the daughter is under age she is, of course, his servant; but this is not the case, if she be of full age. The presumption is, that she is his servant if she

(a) 1 Term Rep., 259.
(c) Peak., 24.

(b) Peak., 240.
(d) Peak., 229, 55.

live with him; but this presumption will be removed out of the way by showing that she lives with him merely as a boarder, and that whenever she earns anything it is her own; and if she be of full age, and do not live with her father, she is not his servant: and, under those circumstances, he would not be entitled to this action. But, in cases of a minor, it is immaterial whether she lives with her father or not. If she be at school abroad, she is his servant; that is, he has a right to her services, and can recall her when he pleases. If she should be at service, he is entitled to the avails of her service. When a daughter is bound out as an apprentice, living with her master, a rigid adherence to the idea that the loss of service is the ground of this action would prevent the father's recovery. But if we consider this action as really having its foundation in another principle, to wit, the disgrace of the family, it would be no objection to the maintenance of this action, although the daughter should live as an apprentice to a master. This action is maintainable, when the father is deceased, by any one who stands *in loco parentis*; as by a mother, or aunt. In this action, the daughter is a competent witness; for she has no interest in the event. (a) It is true, she has an interest in the question; and that, formerly, excluded a person from testifying; but it never excluded the daughter in this action on the case. She was admitted, *ex necessitate rei*. This action is, properly, an action on the case; for the consequential damages are the gist of the action. (b) In England, the form is trespass, *vi et armis*. In Connecticut, it is uniformly an action on the case. (1) Where there has been an

(a) Peak., 55; Term Rep., 4.

(b) 3 Wils., 18; 1 Term Rep., 167.

(1) Where an infant *feme* has been debauched, the laws of almost every State recognize a right of action in the parent, or in any person standing *in loco parentis*, and entitled to the services of the infant, for the seduction. The alleged gist of the action is the loss of service to the parent or master, though in fact it is the injury to the person seduced that furnishes the real ground of the action. It is one of the necessary fictions of the law that gives this right of action to the parent or master, thereby making the infant a competent witness. This is done that the wrongdoer may not escape for want of proof; the transaction being such a one as, from its nature, is susceptible of proof only through the parties to it. It may be question-

entry into the father's house, and this injury has been suffered, the action of trespass, *vi et armis*, may be brought, stating the breaking the house, and stating this injury as an aggravation of damages. (a) But whenever this action is brought, whatever

(a) *Ld. Raym.*, 1063; 1 H. Bl., 555.

able whether the admission of the infant in such cases is not sometimes productive of wrongful consequences, by making a defendant liable who is not in fact the seducer. The answer is, that every privilege of the law is liable to abuse; but in this case it is much easier for the defendant to protect himself against the perjury of the infant by the use of those weapons furnished by the law for his defense—such as impeachment of character, unchastity, &c.—than it would be for the seduced to obtain reparation for a wrong when there are no other means of fixing it upon the seducer than by her own testimony. In these cases, generally, the plaintiff has his election to bring case or trespass, though case is always a proper remedy. *Moran v. Dawes*, 4 Cow., 412. In Vermont, the action of trespass is held to be the proper remedy, and the seduction is, of itself, a substantive ground for the action. *Hubbell v. Wheeler*, 2 Aik. Vt. Rep., 359. The action is founded exclusively on the relation of master and servant, and not of parent and child, and the gist of it is the consequential loss of service. *South v. Denniston*, 2 Watts' Rep., 474. Hence, a mother, though a widow, not being entitled to the service of a child, cannot maintain this action, except by proof of actual service at the time of seduction. *Id.* To establish the relation of master and servant, however, in this action, the slightest acts of service are sufficient. *Moran v. Dawes*, 4 Cow., 512. Thus a father may sustain it for the seduction of a daughter under twenty-one, though at the time of the seduction and impregnation she was absent from his house, living at another place, provided he had the right to her services. *Hornketh v. Barr*, 8 Serg. & Rawle, 36. But if the person seduced be above the age of twenty-one years, there must be some evidence of the relation of master and servant—some proof of actual service performed. Where the plaintiff was brother-in-law of the seduced, who was twenty-eight years of age, and resided with the plaintiff, but paid for her board, it was held that he was not entitled to recover, without some further proof of actual service. *Wilson v. Sproul*, 3 Penn. Rep., 49. This action cannot be sustained by the mother, where the seduction and impregnation took place during the lifetime of the father, with whom the daughter resided at the time; although, after the father's death, she remained with the mother, who was at the expenses of her lying-in, and who supported her and her child. *Logan v. Murray*, 6 Serg. & Rawle, 175.

An action cannot be sustained by the father, when it is proved that he knew of the improper intercourse between his daughter and the defendant when it took place, and did not interfere to prevent it, or that he connived at the intercourse, and consented to his daughter and the defendant being together and having such intercourse after it came to his knowledge. *Travis v. Badger*, 24 Barb., 614. And in no case will an action lie by a parent for an injury to his child, unless some actual loss

will justify the entering the house is a competent justification of the whole charge in the declaration, by way of aggravation;

has occurred to him. The action for the injury should be brought in the name of the child. *Stephenson v. Hall*, 14 Barb., 222; *Robalina v. Armstrong*, 5 id., 247. But the *person seduced* cannot maintain an action for the seduction. *Hamilton v. Lomax*, 26 Barb., 615. In an action for seduction, proof of pregnancy and the birth of a child is not essential. It is sufficient if the illness of the daughter, whereby she was unable to labor, was produced by shame for the seduction. *Knight v. Wilcox*, 18 Barb., 212. That the plaintiff allowed the defendant, a married man, to visit his daughter as a suitor, and placed her in exposed situations, does not deter him from maintaining an action for the seduction, unless he knew the defendant to be married, though it is a circumstance for the jury to consider. *Richardson v. Fonta*, 11 Ind., 466. Where a stepfather adopted the illegitimate daughter of his wife into his family, and she was brought up by him, he can maintain an action for her seduction. The gist of the action is loss of service. *Bracy v. Kibbe*, 31 Barb., 273. In an action for the seduction of plaintiff's daughter, defendant objected that the plaintiff was not entitled to the services of the daughter, she having been indentured to the defendant as a servant. Held, that proof that the defendant procured her to be indentured to him as a means of accomplishing the seduction was admissible in answer to this defense. *Dain v. Wickoff*, 18 N. Y. (4 Smith), 45. It was held in *Seargent's case*, 5 Cow., 106, that, under the following circumstances, the mother could sustain the action for seduction of her daughter: The daughter was laboring under articles of indenture executed by her mother and herself. During the service she was seduced by her master; whereupon the articles were canceled, and she returned to her mother's house and lay-in there. It was held that her mother could sustain an action. But this decision is not supported by the authorities. It is well settled that, to sustain the action, the right to the services must be in the plaintiff at the very time when the wrongful act was committed. And consequential damages and pecuniary disbursements resulting from the seduction would not support the action, unless the right to the services existed in the plaintiff at the time of the seduction. *Davis v. Williams*, 10 Ad. & Ellis, N. B., 725; *Logan v. Murray*, 6 Serg. & Rawle, 175; *South v. Denniston*, *supra*; *Bartley v. Richtmyer*, 4 Comst., 38. But when the father has the right to her services, whether his daughter be living with him or in the employ of some one else, he can maintain the action. *Mulvehall v. Millard*, 11 N. Y. (1 Kern.), 343. In an action by a father for the seduction of his daughter, evidence of a promise of marriage is not admissible as a ground of damages, but may be given in evidence to explain the daughter's conduct, if she is attacked. *Robinson v. Burton*, 5 Harring. (Del.), 335. The defendant's condition as to property may be inquired into, and the plaintiff's dissolute habits, but not his general reputation in this respect. Proof of slight acts of service will entitle the plaintiff to recover for loss of service. And damages, enhanced by seduction, may be exemplary or punitive in aggravated cases. *Id.* And it makes no difference whether the seduction be accomplished by deception or solicitation, as to whether the action may be maintained. *Reed v. Williams*, 5 Sneed (Tenn.), 530.

as if the defendant should be allowed to show that he had a license to enter. This would justify his entry, and bars a recovery, in this form; and when this is the case, the only safe way is to lay the consequential damages, as the gist of the action. If, indeed, the defendant could be considered as a trespasser *ab initio*, as has been contended by some, a recovery might be had, where the breaking and entry is laid as the gist of the action. But this can never be the case; for a man is never a trespasser, *ab initio*, for abusing a license from the party, but only where the law gives a license. When such license as the law gives is abused, the law takes care of this, and pronounces the wrongdoer a trespasser, *ab initio*. (a) (1) Can a father have an action of trespass, *vi et armis*, for taking away his child? There can be no doubt that he is entitled to an action on the case for enticing him away from his service; and it has long been settled in England that he may have an action of trespass, *vi et armis*, for taking away the heir; but I have not found any case of an action for taking away, by force, the younger children. Upon the prin-

(a) 8 Co., 146.

(1) The case of *Hubbell v. Wheeler*, 2 Alf. Vt. Rep., 359, is directly opposed to the doctrine of the text, and though the authorities generally support the correctness of the author's conclusions, it is believed that this is one of the few instances in which they are wrong. In *Hubbell v. Wheeler*, which was an action of trespass, *quare clausum fregit*, the plaintiff offered testimony tending to prove that the defendant, being at the time a boarder in his house, debauched his daughter and got her with child, she being at that time in his service. It was objected by the defendant that, being a member of the plaintiff's family, he entered the house by the license of the plaintiff, and, inasmuch as the seduction of the daughter was laid as an aggravation of the trespass, the trespass being justified, the plaintiff could not recover for the seduction, and moved for a nonsuit accordingly. The jury returned a verdict for the plaintiff. The defendant then moved that the verdict be set aside, and a nonsuit entered. The court in this case admit the doctrine laid down in the text, that a man is never a trespasser, *ab initio*, for abusing a license from the party, but only where the law gives such license, but hold that the abuse of such license from the party may be taken advantage of by a new assignment, and that, in the present case, if the defendant had pleaded the license to enter the house, the plaintiff might have now assigned the debauching of the daughter, and recovered for that as a distinct, substantive trespass, and that the defendant could not, by pleading the general issue, with notice of the license, deprive the plaintiff of the proper matter for a new assignment; and judgment therefore passed for the plaintiff.

[*294] ciples of the common law, it is * clear that, in these States, an action will lie for taking away any child; for all the children are heirs. The whole number of children constitute that character known in the law by the term *heir*. But I see no reason why, in England, the father may not maintain his action against the person who takes away any child; for, surely, he is bound to perform certain duties towards his children, which he cannot perform if they be taken from him; and, to enable him to perform these duties, he is entitled to the custody of his children; and, if this right should be violated by force, I have no hesitation in saying he could maintain the action. (1)

(1) In Pennsylvania, where an illegitimate child had lived in the family of its putative grandfather for several years, it was held that the grandfather might maintain an action on the case for its abduction. *Moritz v. Garnhart*, 7 Watts' Rep. 302.

Proof that the son left his father's service in another State, without his father's consent, and offered his services to the defendant, who, knowing him to be a minor, at first refused to employ him, and did employ him on his urgent request, and upon his representation that he had his father's consent, will not maintain an action for enticing away his son. *Butterfield v. Ashley*, 6 Cush., 249. But, in an action for harboring the plaintiff's son, if the defendant, knowing that the son had ran away from his father, board him in his family and allow him to work on his farm as he pleases, and do this with the intention of aiding or encouraging, or with the knowledge that it aided or encouraged, the son to keep away from his father, he is liable to the action. *Sargent v. Mathews*, 38 N. H., 54. To enable the father to maintain an action for taking his infant children from his possession, he must show some loss of service; but if this be shown, however small its value, the jury may, in addition to this value, give him compensation for his wounded feelings. *Magee v. Holland*, 3 Dutcher (N. J.), 86. A parent cannot maintain an action for enticing away his daughter between the ages of twelve and eighteen from the parent's service, and procuring her marriage, without the plaintiff's consent, to a man of bad character, by fraudulent representations to the city clerk and the magistrate. *Harvey v. Mossey*, 7 Gray (Mass.), 479.

* CHAPTER XL

[*295]

OF THE AUTHORITY OF A MOTHER OVER CHILDREN. OF INFANTS, EN VENTRE SA MERE. OF THE SETTLEMENT OF THE CHILD. OF THE RULE IN CHANCERY, WHERE A PORTION IS SECURED BY MARRIAGE ARTICLES, AND AFTERWARDS AS MUCH, OR LESS, SECURED BY DEED OR WILL. OF ADMITTING PAROL PROOF TO REPEL THE PRESUMPTION THAT A SUBSEQUENT PROVISION, IF RECEIVED, IS INTENDED TO BE A SATISFACTION. OF THE PORTION SECURED BY THE MARRIAGE SETTLEMENT. WHETHER AN INFANT CAN, BY MARRIAGE SETTLEMENT, BIND HER OR HIS REAL PROPERTY, PROVIDED THERE IS A CONSENT OF PARENTS OR GUARDIANS TO THE SETTLEMENT. OF CONTRACTS BETWIXT PARENTS AND CHILDREN.

MOTHERS, during coverture, exercise authority over their children; but, in a legal point of view, they are considered as agents for their husbands, having no legal authority of their own: After the death of the husband, they often have authority. I deem it an immaterial inquiry, whether they possess this authority in character of a parent, mistress, or guardian. (1) As to the question how far a parent is liable for the torts or contracts of his minor children, I know of none which have not been considered in these chapters, except such where he is bound only in character of master; which cases are considered in the chapters on the relation of Master and Servant. By statute, in some instances, the father is rendered immediately liable for penalties for the misconduct of the child.

An unborn infant is now considered, in most instances, *in esse*, as much as one that is born, and, for many purposes, has always

(1) The mother, after the father's death, has no right to the services of the minor child, nor is she liable, as the father is liable, for the support of such child. *Pray v. Gorham*, 31 Maine, 240; *E. B. v. E. C. B.*, 28 Barb., 300; *Bartley v. Richtmyer*, 4 Const., 33; *Commonwealth v. Murray*, 4 Binney, 437; *Williams v. Hutchinson* 3 Const., 312; *South v. Denniston*, 2 Watts (Penn.), 474; 10 Ad. and Ellis, N. R., 725

been so considered. (a) A posthumous child is as much entitled to a distributory share, under the statute of distributions, as one that is born at the time of the death of its father: Or, where the father appoints, under the statute of Charles II, a testamentary guardian to all his children; such person, so appointed, is as much a guardian of a posthumous child, as of any of the other children. (b) So, too, when waste is committed upon such estate as will be the inheritance of a child *en ventre sa mere*, a court of [*296] chancery will grant an injunction against * the waste, on a bill filed in favor of such an infant, by any person who styles himself *prochein ami* to the infant: and such infant may be appointed executor, though he cannot act as such, until he be seventeen years of age; and where a term is created for the purpose of raising portions for younger children, a child born after its father's death, is as much entitled to the benefit of such term, as the other children. (c) So, where land is given by B to C, by will, on condition that he pay \$500 to each of his children living at his death, it was held, that a child born after the death of his father, was entitled to \$500. A devise of a legacy of personal property to an unborn child, if they be twins, the legacy shall be divided between them. An unborn infant may, also, be heir. This must always be the case in Connecticut; but in England, it may be the case, or not. If A should die, leaving a son and daughter at the death, and another son should be afterwards born, this son could not be heir. He would, indeed, as the case might be, be heir to his brother, on the death of his brother, without issue: But if the children A left had been daughters, he would have been heir; and if the posthumous child of A had, also, been a daughter, she would, with her two sisters, have constituted the heir. (d) In these cases, where the unborn child may be heir, when born, the inheritance descends, in the meantime, to the presumptive heir. An unborn infant may take, by devise; and it is not material whether the infant is *en ventre sa mere*, or not. An estate may be given by will, not only to a person *in esse*, but to an unborn child of a person *in esse*, when he arrives to the

(a) 2 P. W., 446; 2 Atk., 117.

(c) Pre. in Can., 56; 1 P. W., 266, 268.

(b) 4 Bac., 446; Pre. in Can., 16; 2 Ver., 712.

(d) 1 P. Wms., 466, 467; 5 T. Rep., 60; Rob. 1.

age of twenty-one years; so that it is possible that such devise may not take effect, until after the death of the parent of such child, twenty-one years and nine months. (a) There was a determination formerly much regarded, when the words of the devise were in the present tense, and when * in the future tense. In the former case, it was holden, that the child unborn [*297] could not take, not being *in esse*; in the latter case, it was admitted, that he might take, when born; it being the clear intention of the devisor, that the devisee should not take, until he was born. But, in late cases, the court have holden, very properly, that no devisor, although he used words in the present tense, could intend that the devisee should take, until he was born. So that this subtle and useless distinction is exploded; and the devisee, when born, can take, whether the words of the devisor are in the present or future tense. In Connecticut, by statute, not only an executory devise, by will, to an unborn infant, is good; but a conveyance, by deed, of real estate, may be given at a future period, to a person in being, or to the immediate descendant of a person in being; but, to avoid a perpetuity, it cannot extend any further. Whilst it was the opinion of the court, that an unborn infant was not *in esse*, it was determined, that the killing such child was not homicide, but a great misprision; and this is still the law, notwithstanding that, for most purposes, such infant is considered as *in esse*. But if a child receive, before birth, a mortal wound from another, by violence, and is born alive, and die within a year and a day, it is homicide: (b) it may be murder, or excusable homicide, as the circumstances attending the transaction should happen to be. (1)

(a) Co. Lit., 11, in notes; 1 Br. in Can., 896; 5 T. Rep., 49; Bur., 2157; 1 Bl. Rep., 612.

(b) 1 Hawk., 181; 4 Bl. Com., 197.

(1) It is now held to be settled law, both in England and this country, says Chancellor KERR, that an infant, *en ventre sa mere*, is deemed to be *in esse*, for the purpose of taking a remainder, or any other estate or interest, which is for his benefit, whether by descent, by devise, or under the statute of distributions. 4 Kent's Com., 249; Goodtitle v. Wood, cited 7 Term Rep., 108, note; Stedfast v. Nicoll, 3 John. Cas., 8; Swift v. Duffield, 5 Serg. & Rawle, 38. In one case, in New York, it was held, that, as respects the rights of others, a child born dead within such an early stage of pregnancy as to be incapable of living, is not deemed to have been *in esse*; and if

The place of the birth of a child is his place of settlement, if neither the father nor mother have any settlement. If his father have a settlement, his settlement is the child's, unless the child acquire a settlement for himself, as in some cases he may: and so often as a father acquires a new settlement, the new settlement becomes the child's. Carth., 433; Comb., 361; Salk., 485, 528; Id. Ray, 478, 587; 1 Bro. in Can., 871. If the father have no settlement, and * the mother have one, the settlement of [298*] the mother is the settlement of the child. It was formerly supposed that, during the coverture, the mother's settlement was suspended, and revived on his death: but, I apprehend, that it is not now considered as suspended in such case; and the children will be settled where the mother has a settlement. Bur. S. Ca., 867, 870, 875. If the father, who has a settlement, die, the children, who live with their mother, will, upon the mother's gaining a new settlement, be settled in the mother's new settlement. Bur. S. Ca., 64, 372, 478. When the mother marries, and removes to the husband's place of settlement, the children of the first husband remain settled, where they were settled at the time of the marriage of their mother. But, if any of them be under the age of seven years, they must go with the mother for nurture: but if they are paupers, they must be supported at the expense of the parish where they are settled (in Connecticut at the expense of the town), but cannot be separated from their mother. 2 Salk., 470; 3 Salk., 259. In

born within the first six months after conception, the presumption is that it was incapable of living. *Marvells v. Thelkimer*, 3 Paige's Rep., 35. In *Thellison v. Woodford*, 4 Ves., 324, it was held that such child was in being, to all intents, except in the case of a descent at common law. In *Trower v. Butts*, 1 Sim. & Sta. 181, it was held, that where a gift was made to children born, &c., a child *en ventre sa mere* should take a share. Among other reasons, in this case, it was suggested that a child *en ventre sa mere*, even in the early stages of pregnancy, should be deemed living, because the potential existence of such child places it within the reason and motive of the gift, and the maxim of the civil law was cited, *posthumus pro nato habetur*. In a late case in Massachusetts, directly acknowledging the authority of *Trower v. Butts*, where a testator bequeathed the residue of his estate to such of his grandchildren as should be *living at his decease*, in equal portions, it was held that a grandchild born within nine months after the testator's death, was entitled to a share of such residue. *Hall v. Hancock*, 15 Pick. Rep., 235.

Connecticut, a minor child gains no settlement by living with a guardian, or master. A settlement is always lost by gaining a new settlement; and is never lost in any other way. In England an infant apprentice, by statute, gains a settlement for himself, in the place where he last served his master, forty days; and, after this, if his father or mother, as the case may be, gain a new settlement for themselves; yet they gain none for him, not even if he be living with his father.

When a child arrives at twenty-one years, and leaves his father's house, or lives with him in the character of a boarder, and his father gain a new settlement for himself, the child's settlement is not changed; but if he live in his father's family, in character of a child, or servant, his father's last settlement becomes his. 1 East, 526; 5 T. Rep., 588. If a minor marry, or enlist into the army or * navy, so that he is no longer 'under the government of his father, his father gains [*299] no settlement for him, by gaining one for himself. Bur. S. Ca., 270, 638; 8 T. Rep., 114, 364; 6 T. Rep., 252. (1)

(1) In Vermont, the settlement of the infant is regulated by statute. Legitimate children follow, and have the settlement of their father, if he have any within the state, until they gain a settlement of their own. If he have none, they follow, and take the settlement of their mother. Illegitimate children have the settlement of their mother; but neither legitimate nor illegitimate children gain a settlement by birth, in the place where they may be born, if neither of the parents have any settlement therein. Rev. Stat. Vt., p. 99. If the husband, having no settlement within the state, abandon his wife and leave the state, she, having a settlement within it before her marriage, may be removed to that settlement; and in that case, the minor children, while they remain with their mother, must be removed with her and retain her settlement. *Bethel v. Tunbridge*, 13 Vt. Rep., 445. In Vermont it is also held, that the wife of a minor son is not of the family of the father, and that the father is not bound to support her. *Manchester v. Rupert*, 6 Vt. Rep., 291.

In Massachusetts, minor children will, after the death of their father, follow and acquire any new settlement acquired by the mother, except by marriage. In case of her acquiring a new settlement by a subsequent marriage, the town where she acquires it will not become chargeable with the support of the children. *Dedham v. Natick*, 16 Mass. Rep., 135; *Freetown v. Taunton*, *ibid.*, 52. Marriage is not, in all cases, such an emancipation as will prevent children from following the settlement of the parents. If an infant daughter is lawfully married, she can afterwards derive no settlement from her mother. *Charlestown v. Boston*, 13 Mass., 469. But

It is a rule in chancery, that when a portion is, by articles of a marriage settlement secured to a child; if the person standing *in loco parentis* should, either by deed or will, subsequently provide for such child, that such provision is a satisfaction of the portion secured. If the provision is as great or greater than the portion, it is a complete satisfaction: if it is not so great, it is a satisfaction *pro tanto*. The parent, in these cases, is supposed to intend that the subsequent provision should be a satisfaction of the portion. It is always to be understood that the child is not compelled to receive the subsequent provision, so as to make it operate as a satisfaction *in toto* or *pro tanto*; but if he do take under the subsequent provision, it is a satisfaction as here stated. (1) The principle upon which the courts of chancery have proceeded, is to give effect to the intention of the parent; and yet it is highly probable, to my mind, that the intention of the parent is much oftener defeated by such an implication, than fulfilled. If, indeed, the provision of the marriage articles, or any other instrument, where, that he would leave the child or children so much, and then by will or deed should make that provision; this would undoubtedly be a fulfillment of the contract contained in the marriage articles: But when there is, by the articles, an actual settlement of a certain sum, or of certain lands, on the issue of the marriage, it is difficult to understand why it may not be understood to mean an accumulative provision.

There certainly could be nothing strange in a parent's enlarg-

marriage is not such an emancipation of a male infant as will enable him to gain a settlement in his own right. *Taunton v. Plymouth*, 15 Mass., 203.

The law in Pennsylvania and Vermont, with regard to the settlement of children, is nearly identical. *Philadelphia v. Bristol*, 6 Serg. & Rawle, 565; *Milford v. Maounges*, 3 Whart., 71; *Washington v. Beaver*, 3 Watts & Serg., 548.

In Ohio, as in Massachusetts, where the mother, by marriage, acquires a new settlement from her husband, she does not thereby change the settlement of a pauper child by her first marriage. *Bloomfield v. Chagrin*, 5 Ohio Rep., 315.

A minor child of parents who are paupers, bound to service by the selectmen by written indentures, is not thereby emancipated. Such child follows the settlement of his father within this state, until he acquires one of his own. *Oldtown v. Falmouth*, 40 Maine.

(1) *Candor & Henderson's Appeal*, 27 Penn., 119.

ing the provision which he first made, especially when he finds that his property has greatly increased, as * is often [*800] the case; and if the parent did not intend that he should take both, nothing could have been more easy than to have expressed it in the subsequent provision. There surely is no presumption, that when a parent provides for his child in a marriage settlement, that he never will make any further provision, unless it shall be considered a satisfaction of the portion in the marriage settlement. It seems to me not analogous to the rule in other cases. If a man should provide, in ordinary cases, for a child, as by giving him a bond of \$1,000 to be paid after his death, and also leave in his will to the child a legacy of \$1,000; both of these are in the nature of a testamentary disposition; and, being given by two distinct instruments, the child is entitled to both. So, too, if a man makes a will, and in the will says, "I give to B \$1,000;" and then, *in totidem verbis*, in the same will says, "I give to B \$1,000;" this is presumed to be a repetition, and B takes only \$1,000: but if the \$1,000 is added in a codicil, he takes both. The rule always, in such cases, is this, viz., if the legacy is given by the same instrument, it is a repetition; if by a different instrument it is accumulative. Why then should not the provision, in an instrument made subsequent to the marriage articles be supposed to be accumulative? It once was a rule in chancery, that when a testator owed a debt, and gave to the creditor a legacy as great or greater than the debt; that this legacy, if taken by the legatee, should be considered a satisfaction of the debt, upon the presumption, that such was the intention of the testator, although he never expressed any such intention in the will. It was difficult to conceive why a debtor might not give a legacy to his creditor, without intending to pay a debt; and very soon after the establishment of this rule the Chancellors began to show symptoms of dissatisfaction [*301] with the rule, and laid hold of a variety of * circumstances to take such cases out of the operation of the rule. In the first place, it was decided that the debt and legacy must be *ejusdem generis*: if it was not, the creditor was paid his debt, and received also the legacy. If the debt were payable in money,

and the legacy were articles of specific property, not money, though of much greater value than the debt, the legacy was not deemed a satisfaction. In the next place, it was holden that the legacy must be payable at the same time when the debt was payable: if it were not, it was not deemed a satisfaction; afterwards it was determined, that if the will contained the usual provisions, "after all my just debts are paid," the testator intended not only that the legatee should have the legacy, but his debt should be paid also. Afterwards it was determined, in a case where the creditor was a natural child, that the presumption was, that both legacy and debt should be paid; the parent being supposed to be under special obligations to provide for such a child. It was then determined that no such presumption arose, unless it could be inferred from some part of the will: and finally the court decided, that to make a legacy a satisfaction of a debt, it ought to have been expressed in the will: So that the rule has been at last exploded. (1)

Whoever will take the trouble to examine the following authorities, will, I apprehend, be satisfied that this is a correct view of

(1) But few American cases are to be found, involving the principle here laid down. The following offers a good exposition of the law, as it is held in one of the states, and probably would be in the others. A testator, who was indebted to his sons A and B, in a sum equal to about 1,400 dollars, bequeathed to A some small specific legacies, and one-fourth of the residue of his estate, after certain devisees and legacies. The will further declared, "that whereas, my son B, is indebted to me sundry sums, advanced, for his benefit, my will is that all his debts to me be canceled, and I bequeath to him the sum of five hundred dollars and no more. At the time of the testator's death, B was separately indebted to him, in the sum of 10,000 dollars and upwards, and he had previously received from the testator a gift of stock to the value of 6,000 dollars. The testator left real and personal property to the amount of 255,000 dollars. In this case, it was held that the bequests did not amount to a satisfaction of the debts due from the testator to his sons. *Byrne v. Byrne*, 3 Serg. and Rawle, 54.

As a general rule, a devise of *land* is not a satisfaction or part performance of a debt, or an agreement to settle money. But if the contract authorizes such a mode of making satisfaction, it will be so decreed, though it is not stated in the will to be in satisfaction. *Bryant v. Hunter*, 3 Wash. U. C. Rep., 48. And where the legacy to the creditor is less than the amount due from the testator, and expressed in the will as a token of friendship, it cannot be presumed to be in satisfaction of the debt or any part of it. *Newland v. Keith*, 11 Vt. Rep., 214.

the subject. Pr. in Can., 188; *ibid.*, 286; *ibid.*, 240; 1 P. W., 141; *ibid.*, 410; 2 P. W., 616; *ibid.*, 555; 1 Ves., 521; 2 *ibid.*, 409; *ibid.*, 686; 3 P. W., 227; 2 Atk., 800; 3 *ibid.*, 96; 1 Bro. in Can., 129; *ibid.*, 275; *ibid.*, 389; *ibid.*, 425.

Why the court have not considered the same circumstances that remove the presumption of a legacy being a satisfaction of a debt, as sufficient to remove the presumption that a subsequent provision by a parent is a * satisfaction of a portion, is not obvious to my mind. Chancery considers a subsequent provision by a parent as a satisfaction, if received of a portion, in marriage settlement. See the following cases: 3 Atk., 98; 1 *ibid.*, 427; 1 P. W., 146; 2 Vent., 847; 1 Bro. in Can., 800; *ibid.*, 8(5).

To make such provision a satisfaction of the portion, it must be of a nature that will last as long as the portion. An estate for life may be of much greater value than an estate in fee; it being a greater property than the estate in fee. Yet such legacy, although received, is no satisfaction of the portion given by the marriage articles in fee simple. 2 Ves., 87. To make a subsequent provision a satisfaction of a portion, it must be *ejusdem generis* with the portion. 3 P. W., 245; 2 Vern., 298.

If A secures to B \$1,000, as a portion, and then devises to B lands of ever so great a value, it is not a satisfaction of the portion, although received.

If the parent is indebted to the child, the rule as to presumption is the same as in those cases where a stranger is the creditor. 4 Ves., 482. (1)

If the father owe B, the son, and leave him ever so great a legacy, the presumption ceases, where the debt and legacy are not *ejusdem generis*, and not payable at the same time; or if the will contains the clause "after my just debts are paid;" and according to some of the latest cases before cited, no such presumption ever arose. If they be correct, the ancient rule is at an end. On this subject, there arises a controverted question, whether parol testimony can be admitted to rebut the presumption that

(1) *Byrne v. Byrne*, 3 Serg. and Rawls, 54.

arises, that a subsequent provision is intended, if received, to be a satisfaction of the portion secured by the marriage settlement.

In 1 Cha. Rep., 106, it was determined, that it might. In that [*303] case the father secured, by the marriage settlement to his * daughters, £3,000 apiece, and then by will gave to them £3,000. Parol proof was admitted, that the father declared that he intended that they should have both, and it was thus decreed. In Pr. in Can. it was decided that no parol testimony was admissible, to show that the legacy was intended a satisfaction for the covenant; nor any to show that it was intended not to be a satisfaction. It seems, from some later decisions, that the latter decision is considered the correct one. This, to my mind, is very questionable. I admit, if the presumption of satisfaction is inferred from any expressions in the subsequent provision, whether by will or otherwise, that no parol proof ought to be admitted, to show what the intention was; but when the presumption arises only from the fact that there is a subsequent provision; from this, equity draws the conclusion, that the subsequent provision was intended as a satisfaction of a portion secured by the settlement. No rule is better established than this; that parol testimony is admissible to rebut an equity. If the intention of satisfaction is collected from the written instrument, as this expression is commonly understood, no parol proof can be admitted to show that the intention is different from that expressed in the instrument: but when it is drawn from a state of things disclosed in the instrument, and equity concludes from the statement that the intention is thus, parol testimony is proper to show that it was not the intention. When A empowers B by will to sell land to pay his debts, B sells the land, pays the debts, and has in his hands 500 dollars, there is nothing more concerning this subject in the will; of course B will retain the 500 dollars in a court of law; but equity presumes that A intended, that if there were a surplus, that the person who would have been heir to the land, if it had not been sold, shall have the surplus. But parol [*304] testimony is admissible * to show that A's intention was, that if there should be a surplus after the payment of debts, that B should have it. Thus this equity is rebutted. So,

too, if A make a will, and order his debts to be paid, and give away a variety of legacies; and when both debts and legacies are paid, the executor, who has a handsome legacy, finds in his possession \$500. This state of things being disclosed, it is admitted, that at law the executor would retain the \$500 as his own; but equity presumes that it was the intention of the testator, that A's legal representatives should have the residuum. This equitable presumption may be rebutted by showing that the testator intended, that if there were a residuum, the executor should have it. These cases are not controverted, and to my mind are perfectly analogous to the question under discussion. The instrument, when the subsequent provision is made, expresses no intention on the subject; but on disclosure of the facts contained in the settlement, and in the instrument of the subsequent provision, equity presumes that the intention was, that both portion and provision should not be holden. This is an equity which I think may be rebutted by parol testimony. (1)

(1) It is said to be a settled rule of presumption, that if a father gives a legacy to his child, and afterwards advances the like sum to the same child, such advancement operates as an ademption of the legacy. *Rob. on Frauds*, 56; *Zeiter v. Zeiter*, 4 Watts' Rep., 214. This presumption, however, is met by another, viz., that every bequest is, *prima facie*, a benevolence; but it is said that the first is the most powerful. *Fowler v. Fowler*, 2 P. Wms., 353, 5th edit. Held, in Pennsylvania, that where there is nothing on the face of a will, and no proof of an intention to give a double portion, an advancement will be satisfaction or ademption of the legacy. Ademption takes place where a parent bequeathes a legacy to a child, and afterwards gives a portion to the same child which is *ejusdem generis*. *Swoop's Appeal*, 27 Penn., 58. Such presumptions are sometimes encountered by extrinsic evidence, importing a design to better the child beyond the extent of the advancement. Such as the declarations of the testator, and his correspondence. *Ellison v. Crookson*, 1 Ves., 100; *Debeze v. Mann*, 2 Br. Ch. Rep., 165. The cases cited will, upon examination, be found almost conclusive of the question raised in the text; but that of *Hinchcliffe v. Hinchcliffe*, 3 Ves., 516, is still more authoritative. In this case, in a settlement made in contemplation of marriage, the sum of £6,000, standing secured upon bonds, being a part of the lady's fortune, and a house, upon a renewable lease, belonging to the husband, among other property of the marrying parties, were assigned to trustees by way of provision for the issue of the marriage, after the death of the parents. After the marriage, the husband without the privity of the trustees, received the £6,000, due upon the bonds, and laid out the greater part thereof upon a mortgage, retaining and applying the difference or balance to his own use. He also renewed the lease of the house, and afterwards assigned it with-

Whether minors can, by a marriage settlement, bind their property, has been a subject of much discussion, provided they have the consent of their parents or guardians. The principle, on which it can be contended that they can, doubtless is this: that, since they can, whilst minors, contract to marry, which contract, when parents and guardians agree to it, binds them

out consulting the trustees, and received the purchase-money to his own use. Not long before his death, there being then two sons and three daughters by the marriage, and the wife being alive, the husband made his will, bequeathing out of his general property portions to his children, to a much larger amount than their fortune under the settlement. A bill was filed by the younger children, praying that they might be declared to be entitled to the benefits provided for them, both by the settlement and by the will. The eldest son, who was the residuary legatee under the will, insisted, in his answer, upon the production of certain books kept by the father, tending to show that the testator did not intend they should have both the bequest and the benefit of the settlement. The important question was, whether this evidence was admissible; and the Master of the Rolls, after a careful investigation of the cases bearing upon the point, held, that inasmuch as the evidence went to show the facts upon which the testator made his will, it was properly admissible. In the case of *Druce v. Darnison*, 6 Ves., 385, the Chancellor treats the doctrine of Lord ALVANLEY in *Hinchcliffe v. Hinchcliffe*, as irreconcilable with his own convictions; and might seem, at first sight, as though the decision in that case was disapproved of. But a careful examination will show that it was the *dictum* of the judge, and not the adjudication of the case, with which the Chancellor expressed himself dissatisfied. In *Zeiter v. Zeiter*, 4 Watts' Rep., 214, it is said to be a well settled doctrine, that the declaration of the testator, both previous and subsequent to the will, are to be admitted, under proper qualifications, to rebut equities or implied trusts. Upon the authority of these cases, and upon the well established rule that extrinsic evidence is always admissible to rebut an equity, it is believed that in the case stated in the text it would be properly admissible.

An advancement was held to be, a pure and irrevocable gift by a parent in his lifetime to his child on account of such child's share of the estate after the parent's decease; it is not chargeable with interest, and the time when it is to be considered and settled, is after the death of the ancestor, regardless of the time when made. *Miller's Appeal*, 31 Penn., 337; *Christy's Appeal*, 1 Grant's Cases, 363. And if a father desires to prefer one child to another in the distribution of his property, he is bound to state his designs expressly, by declaring, that the gift or legacy is intended "as an advancement or extra portion," or using other equivalent terms. *Montgomery v. Cheney*, 13 La. An., 307. But in *Christy's Appeal*, *supra*, it was held that the question, whether a conveyance of property by a father to his son is to be considered as an advancement or a gift, depends on the *intention of the grantor at the time the conveyance is made*. And in the same case, it was decided, that the declarations of the grantor at the time of making the conveyance, or of the grantor

(and as it has been supposed that marriage settlements contribute to domestic happiness, which it is sound policy to cherish), it is highly reasonable that minors, as well as others, should derive benefit from such a transaction, especially as they are competent, with consent of parents, to bind themselves by the principal contract, viz., to marry. It * is reasonable that, with the same consent, they should be able to enter into this incidental [*305] contract of a marriage settlement, which is ancillary to the principal contract. When the cases are examined, where this point has been the subject of discussion, it would seem as if there had been a change of sentiment in the English courts on this subject. In 3 Atk., 612, we find a case where a *femme infant* entered into a contract, with the consent of her parent, respecting her portion in money; and it was holden, that she was bound by it. See, also, 2 P. Wms., 608; 9 Mod., 101. This principle was acknowledged as correct by Lord THURLOW (1 Bro. in Can., 112), provided the settlement had been an adequate settlement; for, he says, to bind an infant, the settlement must be fair and reasonable, 1 Bro., 152, 113, in the notes. That the real estate of a *femme infant* might be bound, where there was a marriage settlement, was holden by Lord MACCLESFIELD, in a case, 3 P. Wms., 242. He there lays it down, as the law of chancery, that a covenant, by a *femme infant*, to convey her real property, in consideration of a competent settlement, is binding upon her; and that equity would decree a specific performance of such covenant. All that was required was, that the settlement should be competent. Lord HARDWICKE, also, in the before-mentioned case in 3 Atk., said, that there are cases of this kind where the performance of such a contract by a *femme infant* will be decreed. In the case of

at the same time, or afterwards, are evidence, from which it is to be determined whether the conveyance is a gift or advancement. And in Indiana, it was held, that under the statute of 1848, the question whether a conveyance to a child was intended as an advancement, is a question of fact for which a jury may be claimed. *Shaw v. Kent*, 11 Ind., 80.

If notes were taken from a son-in-law by the testator, for money advanced, the presumption will arise, that the sums were intended for a loan, and not an advancement; but this is subject to be rebutted, and is a question for the jury. *West v. Bolton*, 23 Geo., 531.

Durnford v. Lane, 1 Bro. C. C., this question was much agitated; and it is apparent that it was a question of great perplexity to Lord THURLOW, who finally determined it; but left this point open and undecided, as appears from 1 Bro. C. C., 510. This question was, at length, decided by Lord THURLOW, in the case of *Clough v. Clough*; and the decree declared, that her estate [*306] was *not bound by the marriage articles. It is observable, that there is no case where it was ever holden that a male infant can bind his property by a marriage agreement (1)

Contracts which have been entered into between parents and their children, soon after they have come of age, are always viewed in chancery with a jealous eye, when the parent has the advantage in the bargain. (2) In 1 Ves., 400, there is a case in which it is difficult to discover any fraud, where the mother and the child came to an agreement respecting the personal property of the husband of the mother and father of the child, by which agreement the child took £10,000 in full of her share of her father's estate. She, afterwards, married. It appeared, upon the settlement of her father's estate, that there was a very great disparity betwixt the share of the mother and that of the daugh-

(1) It was once well settled, that a male infant might, by an agreement before marriage, bar himself of an estate by the curtesy, or his interest in the personal property of his wife. *Slocombe v. Glubb*, 2 Bro. C. C., 545; *Strickland v. Croker*, 2 Cas. in Chan., 211; *Atherley on Marriage Settlements*, 42, 45; *Cape v. Adams*, 1 Desaus. Ch. Rep., 567; *Tubb v. Archer*, and *Randolph v. Randolph*, 3 Hen. & Munf., 399. This is now questioned. 2 Kent's Com. In *Milner v. Lord Harewood*, 18 Ves., 259, it was held that a female infant was not bound by an agreement to settle her freehold estate on marriage, without an option, when she arrived at her majority, to avoid the settlement. A jointure, or other equitable provision, settled upon an infant as a jointure, is a good bar of dower. *Drury v. Drury*, 1 Eden's Rep., 39; *McCartee v. Teller*, 2 Paige's Ch. Rep., 511.

(2) Where a daughter, immediately on arriving at full age, makes a voluntary conveyance for the benefit of her father, the transaction will be examined by the court with the most jealous scrutiny and suspicion. If the mind of the child were brought to a purpose preconceived by the parent for his own sole advantage, by an influence which the donor could not escape in the circumstances in which she was placed, and which is deliberately used to effect such a purpose, then the exercise of such influence will be held to have been undue and improper. *Bergan v. Udall*, 21 Barb., 9.

ter; for, what the daughter did not take, the mother took by the agreement. The daughter, with her husband, filed their bill in chancery, to be relieved against this contract, and the court set it aside. It is not pretended that there was any direct fraud; and it is difficult to see anything in the case more than a bargain of hazard. There was nothing from whence to conclude that the mother knew anything more respecting the state of the property than the daughter; but the case must have proceeded on the ground that, probably, the mother might have known more what would be the probable result than the daughter did, and that she concealed this supposed knowledge, which she ought to have disclosed. Relief, in this case, was given, on the same ground that relief would have been given where there is no such relation as there is here, of parent and child, viz., on the ground of a fraudulent concealment; yet, if there had been no such relation, and the circumstances had been the same, the court would not have *considered it sufficient proof of a fraudulent concealment. [*307]

The relation of parent and child is not, of itself, a sufficient ground for the interposition of a court of chancery; but, unquestionably, chancery will set aside a contract, where this relation exists, on evidence of fraud, or taking an undue advantage—more slender than would be required in other cases. Lord HARDWICKE, in a case, 2 Atk., 258, says, this is a case of a conveyance obtained by the father from his child; and, when that is the case, says he, it is a strong circumstance to induce the granting of relief. There is a case in 2 Atk., 160, where the doctrine is maintained, that a beneficial bargain, obtained by a parent from a child, will be set aside, on slender evidence of fraud or imposed hardship. In 3 Bro. in Can., the father had a life estate of real property, of which his son was owner in fee in remainder. The son was poor, and actually dependent on the father. The father, by threats and promises, induced his son to convey his estate in the remainder to him; stating, falsely, that there was a consideration of £1,000, which the son owed to him, for no debt was due from the son to the father. The son died; and the person who claimed under him brought a bill to set aside the conveyance of

the son to the father, which was accordingly done. The relationship must have been the *sine qua non* of that decree; for, however fraudulent it might be, in another case such decree could not have been made. Suppose A should prevail upon B to convey to him, under such false statement of a debt, it would be a valid conveyance betwixt A and B, although fraudulent as to creditors; and if B were dead, and his right had descended to C, C would be in no better situation than B. It was an essential ingredient in the case, that the contract was between the father and child. Where the * influence of the father has been [*808] exerted to procure a reasonable family settlement, or to prevent a son from ruining himself by his extravagance, chancery will not interfere, by setting aside contracts that have such beneficial tendency. 2 Atk., 85; Bro in Can., 369. When a parent purchases an estate in the name of his child, this is considered as an advancement of the child, and as his property; there being no resulting trust for the benefit of the father. The law, in this respect, betwixt the father and the son, is different from what it is betwixt a purchaser and a stranger, where the purchase is made in the stranger's name: as where the stranger purchases in his own name, with the money of another person. In the latter case, a trust will result to the person who paid the money; and the trust may be proved by parol testimony. Being a resulting trust, it is not within the statute of frauds and perjuries. Pte. in Can., 84, 138; 1 Vern., 308; 2 id., 480; 2 Atk., 74.

Lord HARDWICKE lays it down as law, that parol testimony may be admitted to show the mean circumstances of the man in whose name the purchase is made, whence to infer a trust. 2 Atk., 71. Whatever doubts may have been entertained on this subject, the case of *Linch v. Linch*, in 10 Ves., Jr., 811, seems to have dissipated them. The Master of the Rolls held, that, in such cases, parol evidence was clearly admissible; and said that it was now settled that, in such cases, money may be followed into the land in which it is invested; and a claim of this sort may be supported by parol testimony. The equitable presumption is, that he who was owner of the money is entitled to the land purchased; and that the person to whom the legal title is conveyed

is a trustee of this title for him. But the equity in this case, as in all others, may be rebutted by parol testimony, showing that it was the intention of the owner of the * purchase-money [*809] that he to whom the conveyance was made should take, beneficially for himself, discharged of all trust. 10 Ves., Jr., 860; Sugden's Law of Vendors, and cases there cited, 418. This doctrine does not apply to the case where a man employs another to purchase for him, and the agent purchases; but no part of the purchase-money is paid by the employer; and there is no written agreement. The employer, in such case, cannot compel the agent to convey to him; for such a contract is void by the statute of frauds. The case of a purchase by a parent, in the name of a child, is altogether different from the cases before stated. In such case, there is no resulting trust. The conveyance is, in law, deemed a gift to the child. Even if the child be illegitimate, and is not provided with property, the presumption is, that, as the parent is bound to provide for the child, he so intended. And, when the purchase-money is not all paid in the lifetime of the father, his personal estate must pay it for the benefit of the child. Sugd., 420. If the child had been advanced (no expectancy is to be considered as an advancement, and when the child has not his full share of his parent's estate, he is not advanced), he will be considered as a trustee for the parent; or, if the parent can show, in any case, that he intended that the child should be considered as a trustee, he shall be so considered. Sugd., 421; East., 260; Ld. Raym., 994. It has been supposed that the parent's continuing in possession, after the child came of age, was proof that the child was a trustee for the father. This idea is now exploded. 1 P. Wms., 112; 2 Vern., 19. It has been urged that the parent's laying out money in repairs was evidence of a trust; and that a subsequent declaration of a trust was also evidence; but the decisions are otherwise. 2 Free., 32, 252.

CUSTODY OF CHILDREN. Where a mother deserted her husband before the birth of her child, for which desertion her husband obtained a divorce, and she afterwards retained the child in her own keeping, and brought suit to recover of the father for its maintenance, it was held that she was not entitled to recover. *Filter v. Filter*, 33 Penn., 50. If, upon the return to a writ of *habeas corpus*, granted on the peti-

tion of the father of an infant, and upon examination of the infant, it appears that he is not restrained of his liberty, but remains voluntarily with the respondent, a judge of the Superior Court of New York has no power to order his return to the father. *People v. Porter*, 1 Duer, 709. The Supreme Court, as succeeding to the entire jurisdiction of the Court of Chancery, is the general guardian of infants. *Id.*

Where a widow, having children, marries again, she can no longer control the persons or property, or earnings. *Williams v. Hutchinson*, 3 Comst. (N. Y.), 312. See, also, *Brown v. Lynch*, 2 Bradf., 214.

GUARDIAN AND WARD.

*CHAPTER I.

[*§11]

OF THE VARIOUS KINDS OF GUARDIANS.*

A GUARDIAN is one, that legally has the care and management of the person, or estate, or both, of a child, during his minority, whose father has deceased. It is true, the father himself is guardian of the estate of his minor child. Such child is denominated a Ward at common law. It often happens that one person is guardian of the person, and another of the estate of the minor; and often the same person is guardian of both. There are various kinds of guardianship known to the common law.

1st. *Guardianship in Chivalry.*

This is not now in use in England, and was never known in these States. This took place only where lands came to an infant by descent, which were holden by knight service. That tenure being abolished by the statute of Car. II, this kind of guardianship ceased to be used. Further observations, therefore, upon this kind, are unnecessary. I refer the reader to Co. Lit. 88, 11th note.

* It may not be considered out of place, to notice that, the statutes of the several States, provide for the appointment of guardians (or committees) in the case of spendthrifts, and incompetent, insane and absconding persons, as well as in the case of minors. Statutes of Maine, 1821, c. 51, sec. 53; Compiled Statutes of Vermont, 407; 2 R. S. of N. Y., 5th ed., 882; Stacy v. Benson, 18 Pick., 496; Davidson v. Johannot, 7 Met., 388. Though, as the author has not examined the relationship in these respects, it is to be presumed not to have come within the plan of his work. And further, the nature of the relation being alike in all, a doctrine which would be applicable to either one, would be applicable to the others.

2d. Guardianship by Socage.

This takes place when socage lands descends to an infant under fourteen years, and ceases when the infant arrives to the age of fourteen years. The person, entitled, by law, to the guardianship, in this case, is the next of kin, who by no possibility can inherit the estate. Suppose, for instance, John Stiles * [*812] dies, and leaves Thomas his son and heir; his uncle, George Stiles, his father's brother; and Anthony White, his mother's brother: in this case, George Styles and Anthony White are both next of kin to Thomas; but George must be excluded; for he may, in the event of 'Thomas' dying without issue, inherit the estate; but Anthony White never can inherit it; for an estate that descended to Thomas, on the part of his father, cannot, by the English law, descend to any relation on the part of the mother. Anthony White is, therefore, in the case put, guardian by Socage. Suppose again, that Thomas's relatives, were Samuel Stiles, a brother of the half blood, and Henry Stiles, a brother of the whole blood: these brothers are in an equal degree of kindred; yet Henry is excluded from the guardianship, for he is of the whole blood; but Samuel, being of the half blood, can never inherit; he therefore is entitled to the guardianship. Such a case may happen, where the lands are holden in borough English. The principle of this rule is, that it was dangerous to commit the care of a ward to one who would inherit his estate, in case of his death, lest it might prove a temptation to the guardian to destroy the life of the ward. Such a precaution might be proper, in the rude ages, when it was established to be law; but the present ameliorated state of society renders it useless. (a) There is no difference to be observed, in point of right to this guardianship, betwixt the whole and half blood, if they be equally qualified, by not being able ever to inherit the estate descended. As in the case put, of land descending from John Stiles to Thomas: if Anthony White had a half brother, Peter White, Peter would be as much entitled as Anthony, to the guardianship. If there are several, who are next of kin, both males and females, the males are entitled to

(a) 1 Flow., 467; Co. Lit., 88; 1 and 2 Mod., 778.

the guardianship, in preference to the * females. In all other cases, where brothers are equally entitled, the eldest [*313] is preferred; but in this case, the one who first takes possession of the ward, has the right; as in the case of Thomas Stiles, having lands descended to him, as in the last case, if Anthony White had two sisters, Sally and Susan White; in that case, Anthony and Peter would be preferred to Sally and Susan; and that one, whether Anthony or Peter, who takes possession of the ward, would be entitled to the guardianship; but Anthony and Peter being dead, then Sally and Susan would be entitled; and that one who got Thomas into her possession, would be the guardian. But in the case put, of lands descending in borough English, if Samuel Stiles, the brother of Thomas, had a brother, Richard Stiles, of the whole blood, and Samuel was the eldest, Samuel would be preferred to Richard, although Richard should get possession of Thomas. (a)

The guardian in socage is guardian of the person of the ward, as well as of his estate. (b)

The guardian in socage cannot assign his guardianship. At fourteen, the ward is no longer under such guardian; (c) he may then demand his estate, and have an account from the guardian; he may enter upon the guardian, and oust him: but being still a minor, he may be under another guardian of a different description. A guardian in socage, during the guardianship of the infant, may lease his estate, and maintain ejectment against a disseisor in his own name. (d)

Guardianship in socage can scarcely exist in any part of the United States; (1) for it is a necessary qualification, that the per-

(a) Co. Lit., 86, note B.
(c) Co. Lit., 90; Plow., 303.

(b) Co. Lit., 87, 89.
(d) 2 Bac., 632.

(1) This description of guardianship was never very common in the United States, and in those states where it was once adopted it has now fallen into disuse. It was formerly recognized in New York, where it has been held, that a guardian of this kind might maintain actions of trespass or ejectment in respect to the lands of his ward. *Jackson v. De Watta*, 7 John. Ch. Rep., 66; *Byrne v. Van Hoesen*, 5 John. Rep., 66. But now all the powers of such guardian are by law vested in a guardian appointed by the surrogate. *Rev. Stat. N. Y.*, vol. I, p. 718, § 5, and vol. II, p. 151, §§ 4, 5, 6. In the other states, but few traces of this species of guardianship will be found.

son entitled should not be able, by possibility, to inherit the estate. The provisions of the statutes of descents are such, that, in most cases, those that are of kin may eventually inherit the estate descended; but in * some cases, it is otherwise. Where a [*314] particular description of kindred cannot inherit, it would be possible that this kind of guardianship should exist, as in the State of New York, where we will suppose John Stiles died, seised of Blackacre, which descended to him from his father Reuben: and his relations living were Henry Stiles, Richard Stiles, and Thomas Stiles, the sons of his father (and it is no matter whether they are of the whole or half blood,) and John and Susan Rowe, the children of his mother by another husband. Now, in that case, John and Susan can never inherit to John Stiles, or to an estate that came to him by descent from his father, Reuben Stiles; for the statute of that State provides, in such case, that the estate shall go to the brothers and sisters of the deceased of the blood of the person from whom it came. John and Susan Rowe have one qualification; they are brother and sister to John Stiles; but they are destitute of the other qualification; they are not of the blood of Reuben Stiles, from whom the estate came, and cannot therefore inherit. Of course they may be guardians by socage, to their brother, Thomas Stiles. But Henry and Richard could not be guardians, for they are brothers of John Stiles, and of the blood of Reuben, from whom the estate came; and can inherit to the estate: and if Richard and Henry were also half brothers, it makes no difference; for they are brothers to John Stiles, and of the blood of Reuben, from whom the estate came. The reason why John and Susan Rowe cannot inherit, is not because they are brother and sister of the half blood, but because they are not of the blood of the person from whom the estate descended to their brother, John Stiles.

3d. Guardianship by Nature.

This, by the common law, extends only to the person; and the subject of it is only the heir-apparent and not the [*315] other children; not * even the daughters, when there are no sons; for they are not heirs-apparent, but presumptive

heirs only, since their heirship may be defeated, by the birth of a son after their father's decease. The father is guardian by nature; and, in case of his decease, the mother; and, on her death, the next of kin. (a) Among next of kin, priority of possession decides the right. The rule is that guardianship by nature, extends only to the heir. It follows, of course, that, in the United States, it must extend to all the children; for they are all heirs. What the eldest son is in England all the children are here; who, in this country, constitute that character known in the English law by the term *heir*. (1)

4th. Guardianship by Nurture.

The subjects of this, are the younger children; not the heir. It is manifest that there can be no room for this kind of guardianship, in our country; for all the children are heirs, and subjects of the guardianship by nature. (2)

5th. By statute of Car. II, a new kind of guardianship was permitted to be made by the will of a father. He could, in that instrument, appoint a guardian to his children, until they were twenty-one years of age, or for any shorter period. If no time

(a) Co., Lit., 88; Carth., 296.

(1) The father is guardian by nature. *Jackson v. Combs*, 7 Cow. Rep., 36; 2 Wend. R., 153; S. C., 2 Kent's Com., 220; *May v. Calder*, 2 Mass. Rep., 55. On his decease, the mother. *Freto v. Brown*, 4 Mass. Rep., 675. The mother of a bastard child is its natural guardian. *Somerset v. Dighton*, 12 Mass. Rep., 383; *Wright v. Wright*, 2 Mass. R., 109. The power of the guardian, by nature, is limited, and liable to be controlled by the court of chancery. He has no authority to lease the infant's lands. *May v. Calder*, 2 Mass. Rep., 55. Nor can he give a binding discharge to an executor on the payment of a legacy belonging to the child. *Genet v. Tallmadge*, 1 John. Ch. R., 3; *Miles v. Boyden*, 3 Pick., 213. The court of chancery may control his authority. *De Manneville v. Manneville*, 10 Vesey, 52. And it has even been held, that chancery would deprive him of the custody of the child, if his character rendered him an unfit guardian, though this has been questioned. *Wellesley v. Duke of Beaufort*, 2 Russell's Rep., 1; 2 Kent's Com., 221, in note.

Section 9, chapter 90, Laws of New York, 1860, provides that "every married woman is hereby constituted and declared to be joint guardian of her children with her husband, with equal power, right and duties in regard to them with the husband."

(2) The guardian had only the care of the person and education of the infant, but nothing to do with his lands, by virtue of his office. *Bac. Abr.*, tit. Guardian, A. But it is now entirely obsolete. 2 Kent's Com., 221.

was mentioned, such guardianship continued until the ward arrived to full age. This guardianship extends to person and estate, of every kind. Such appointment may, also, by that statute, be made by deed. When made by will, it has always been understood, that this may be done by an infant, when he has arrived to that age, at which he can make a will of personal property. But a doubt has arisen, whether he could do it by deed, until he has arrived at the full age of twenty-one years.

[*316] When we reflect that such deed is not to operate until the death of the maker, and is * ambulatory, and revocable, during his life, it will appear to be nothing more than a testamentary instrument, in the form of a deed; and there cannot be any objection, therefore, to the infant's ability to make the appointment, by deed, at the same age, that he can by will. (a) This guardianship supersedes all the other guardianships. When this is made, there can exist no guardian in socage, by nature, or by nurture. Such guardian can never assign his trust; for the trust is personal; and if he die, such guardianship ceases, and cannot be perpetuated by his will. (b) (1)

(a) 1 Bl. Com., 402; Co. Lit., 69.

(b) 2 Atk., 1.

(1) The provisions of this statute have been generally adopted in the United States, with the exception of New England, and the same powers are given to the guardian that he possesses under the English statute. Rev. Stat. Mass., 1835; Stat. New Jersey, 1796; Elmer's Digest, 698; Rev. Stat. N. Y., Vol. II, p. 164; 1 Virginia Rev. Code, 240; 3 Stat. Ohio, p. 1788; Stat. of Pennsylvania. Under this statute, it has been held in England, that a father might dispose of his children born and to be born, including children by a second wife. *Ex parte*, Earl of Rochester, 1 Ves., 316. It is said that the power of such testamentary guardian is not determined, though the infant marry before he or she becomes of age. 3 Kent's Com., 324. In the matter of Whittaker, 4 John. Ch. Rep., 389; Roach v. Garven, 1 Ves., 160. Though opposite opinions have been held. *Mendes v. Mendes*, 1 Ves., 89; *Jones v. Ward*, 10 Yerges, 160. See, also, *Mohawk Bridge Company v. Utica and Schenectady Railroad Company*, 6 Paige's Rep., 554.

The Statute of Car. II., creating a new kind of guardianship, referred to in the text, giving persons power to appoint guardians over their infant children by will, has been adopted in New Hampshire. *Belch v. Smith*, 12 N. H., 437.

The right of the father to appoint, by his last will, is recognised in Vermont, whether such child is living at the time of making the will, or is born afterwards. Com. Stat. of Vt., 1860, p. 407, sec. 8.

The right of the father to appoint a guardian by deed or will is also conferred by statute in New York. 3 Rev. Stat. of N. Y., 5th ed., p. 243.

6th. There are cases where a minor may elect his guardian, by the English law. This is when he has no other guardian, and none was appointed by will. No socage lands descended to him. There would, therefore, be no guardian by socage; and, if there had, he was fourteen years of age, or has arrived to that age since. There is no guardian by nature; for he is not an heir-apparent, and, consequently, not the subject of such guardianship. He has no guardian by nurture; for his father and mother are both dead; and this kind of guardianship can be exercised by no other character, except a father or mother. The infant may, then, elect for himself (a) This election is made before the ecclesiastical courts, by the infant's declaring in court, by parol, his election, which is there recorded; or it may be done by a writing, lodged in such court. The court has power to reject or sanction the choice of the infant; and will reject it, if the court have reason to believe that the infant has chosen an improper person. A male infant cannot elect, until he has arrived to the age of fourteen years; for then, it is said, he arrives to the age of discretion. And, for the same reason, I should suppose, a female might elect at the age of twelve years; for then, it is said, *she* has arrived to the *age of discretion; and it [317] seems to be a very proper time for her to be under the protection of some discreet person. (1)

7th. *Guardians are often appointed by Chancery.*

This practice was unknown to the common law; but began to be resorted to in the latter part of the reign of William III. The ground on which this court have assumed this power, has its foundation in the regal prerogative. It is the duty of the king, as *parens patriæ*, to take care of all the infants within the realm. This exclusive care is, by him, delegated to the chancellor, who, with propriety, is considered paramount guardian to all the infants in the nation; and all other guardians are subject to his control. This power of appointment is not assumed by

(a) Co. Litt., 67, 69; 1 Ves., 375.

(1) In Vermont, by statute, the minor, if above the age of fourteen years, has the right of choosing his guardian, subject to the approval of the probate court. Rev. Stat., Vt. 1839, p. 332.

the courts of chancery, where there is a proper guardian already appointed. This court has not only power to appoint, where there is no guardian, but it has the power of removal, when an improper person is appointed, or becomes such, after appointment; (a) and this power it exercises over every species of guardians; and it is no objection that the guardian is testamentary. (1)

8th. The elementary writers seem to have supposed that the ecclesiastical courts had a right to appoint a guardian. It is certain those courts have claimed this power of appointment of a guardian, both to the person and estate of the infant. Their power to appoint for the person has always been denied by the common-law lawyers; but, as to their power to appoint a guardian to the personal estate of the infant, it seems to have been admitted. (b) But this is now denied by the later authorities; and, of course, no such authority exists in the ecclesiastical courts. (2)

* 9th. Guardianship, *ad litem*, is where an infant is made [*818] defendant, who has no guardian, and the court, before

(a) Co. Litt., 59; 2 Bul., 679; 1 Br. P. Ca., 524; 1 P. Wms., 708; 8 Med., 214; 9 Id., 325; 1 Ves., 160.

(b) 14 Vin., 178; 8 Keb., 296; Bur., 1496; 3 Atk., 681.

(1) In Vermont, Massachusetts, Connecticut, and several other of the United States, the power of appointing guardians is lodged in the probate court. In New York, the guardian may be appointed by the Supreme Court, which has the jurisdiction of the old Court of Chancery, or by the surrogate of the county; in New Jersey, the orphans' court or the surrogate; in Ohio, the court of common pleas; and, in Pennsylvania, the orphans' court. The practice, which has long prevailed in England, of appointing guardians by the Chancellor, has been introduced into the United States, and this power is very frequently exercised. 1 John. Ch. Rep., 23, 99, 156. It is in chancery that the general jurisdiction over every guardian still resides, and subject to its superintendence and control. 2 Kent's Com., 227.

A surrogate has jurisdiction to compel the guardian of a minor, appointed by him, to account as to the estate of the infant. And the accounting to which the guardian may be subjected by proceedings before the surrogate is, not only a statement of his receipts and disbursements, with the amount of the trust-fund still remaining in his hands, but it is, in addition to such account stated, a rendering and giving up to the party entitled of the moneys and property in respect to which the accounting party is liable. *Seaman v. Duryea*, 11 N. Y. (1 Kern.), 324.

(2) It is almost unnecessary to say, that no guardian is appointed by such court in the United States.

whom the suit is, appoint one, *pro hac vice*. (a) The court never appoint a guardian, *ad litem*, to an infant plaintiff; for he must sue by his guardian, or *prochein ami*. In a criminal case, no guardian is appointed, *ad litem*; the court is guardian for the accused infant. In Connecticut, the court appoint a guardian to the accused. (1)

10th. By letters patent, a guardian has been appointed for all suits; but the court has power to appoint only for the suit then depending before the court. (b)

(a) Co. Litt., 89, note 16, or 136, 53.

(b) Co. Litt., 89, note 16.

(1) The cases involving a consideration of the powers and duties of a guardian, *ad litem*, will be found principally collected in a note to Judge Bouvier's edition of Bacon's Abridgement, title Guardian. These powers and duties, being regulated by the common law, do not essentially differ in the several States. *Larkin v. Mann*, 2 Paige's Rep., 27; *Wood v. Wood*, id., 108; *Knickerbacker v. De Freest*, id., 304; id., 301; id., 85; *Roberts v. Stanton*, 2 Munf., 129; *Wills v. Winfree*, 2 id., 842; *Turner v. Partridge*, 3 Penn. Rep., 172. Such guardian has not authority, by virtue of his office, to discharge the interest of a witness. *Walker v. Ferrin*, 4 Vt. Rep., 523.

A guardian *ad litem* for an infant over fourteen years of age should be appointed on the application of the infant by petition; and the court must be satisfied that the infant has made a voluntary nomination. No person can be appointed guardian on his or her application, and without the infant's consent. *E. B. v. E. O. B.*, 28 Barb., 299.

A purchase, by the guardian *ad litem* of infant parties to a partition suit, of lands sought to be partitioned in such suit, at a sale thereof by a referee, which purchase is not made in behalf or for the benefit of such infants, is void. *Lefevre v. Laraway*, 22 Barb., 168.

[*319]

*CHAPTER II.

OF THE KINDS OF GUARDIANS IN CONNECTICUT. OF THE POWER OF A COURT OF CHANCERY, AND OF SURROGATES OF PROBATE COURTS, TO APPOINT AND REMOVE GUARDIANS. OF THE RIGHT OF ELECTION OF A GUARDIAN BY THE WARD. OF THE GUARDIAN'S GIVING BOND FOR THE FAITHFUL DISCHARGE OF HIS TRUST; AND HIS LIABILITY TO ACCOUNT FOR THE INFANT'S ESTATE.

IN Connecticut, there is no guardian by chivalry; nor, indeed, in the Union. Neither is there, in this State, any guardian by socage; for kindred of the deceased, of every description, can, in some event, inherit any estate, of which he died the proprietor. Neither can such a character exist in the Union, only in those States where some of the kindred of the deceased are excluded from inheriting in any event. There is, in Connecticut, no guardian by testament; neither can there be, in any State in the Union, unless there is a particular statute for this purpose; for such a guardian is wholly unknown to the common law, and was introduced into England by the statute of 12 Car. II, which was after the emigration of our ancestors into this country, and never considered as having any binding force here. No ecclesiastical court in the Union pretends to possess the power of appointing guardians. The courts of chancery never appoint a guardian in Connecticut, or claim the power of removal. There can be no guardian by nurture, in the United States; for no person is a subject of this but a child who [*320] is not an heir-apparent; and, in these States, all the children are heirs-apparent.

The only guardians known in Connecticut, are, 1st. Guardians by nature. 2d. Guardians by the appointment of a court of probate. 3d. Guardians, *ad litem*.

A guardian by nature, in this country, differs widely from such guardian in England. In that country, it extends only to the eldest male child, he, alone, being heir-apparent. In this coun-

try, it extends to all the children, males and females; for all of them are heirs-apparent. His authority there, is over the person only; but here, it is also over the estate. It is no uncommon thing in England, for a court of chancery to appoint such guardian to the whole estate. The same powers of removal of any guardian, as are exercised in England, in a court of chancery; in Connecticut, belong to the court of probate. If a father be living, he is guardian by nature to his child, until he is twenty-one years of age; but he is liable to be removed by the court of probate, as to his estate, but not as to his person. If the father die, the mother is guardian by nature, to her minor children, both males and females. But the mother is not in the same situation as the father: she has no right to the personal services of her children, only when she maintains them. If they have property of their own, they are to be maintained from that. The mother has no right to the person of her child, as the father has. The court of probate may, therefore, remove her from this guardianship, as well as from the guardianship of his estate; and this is done by appointing another guardian. I know that it has been said, that she cannot be removed from her guardianship of females; but I know of no law or usage that warrants that idea. (1)

(1) Substantially the same provisions for the appointment and removal of guardians exist in Vermont. *Rev. Stat. Vt.*, 1839. See, also, 2 *Kent's Com.*, 322; and *note*, chap. 1, and notes.

The appointment of a guardian by a surrogate is to be deemed valid until reversed, and while the child is in the custody of its general guardian, duly appointed by the surrogate, it cannot be deemed under illegal imprisonment or restraint merely from the guardian's refusal to deliver such child to his mother. A court of equity possesses a controlling and superintending power over all guardians whether testamentary or appointed by the surrogate. And it will exercise that power by taking the ward from the guardian and delivering it to its mother or some other person, whenever the interest of the ward requires it. *People v. Willcox*, 22 *Barb.*, 178.

No person, on strict legal right, can claim to be appointed as the guardian of another, but with the exception of certain legal disqualifications, the appointment is left to the discretion of the judge of probate. But the statute authorizes an appeal from the decree by any one aggrieved thereby, and the next of kin or heir presumptive of the ward may be aggrieved within the provision of the statute, and may lawfully take an appeal from such decree. Whether the appointment by the judge of probate was of a suitable person for the trust is a fact to be determined by the pre-

When there is a mother, it is not, of course, the duty of the court to appoint a guardian; for she will remain guardian, [*821] until one is appointed; but if there be no father* or mother, it is the duty of the court to appoint a guardian; for there is no such usage that the next of kin is guardian. If the infant be under the age of choosing a guardian, (which, by our statute, is fourteen years of age in males, and twelve in females,) the court, without any process to call the infant before it, appoints a guardian. If the infant has arrived, as before mentioned, to the age of choice, the court issues a summons to call him before the court, to elect a guardian. If the infant neglect

siding judge of the appellate court, on the evidence before him. *Lunt v. Auburn*, 39 Maine, 392. When a child has been duly surrendered by its father and natural guardian to a charitable institution pursuant to the charter of said institution, by an instrument in writing, signed by the father, such surrender will not be superseded and rendered inoperative and void by a subsequent order of the surrogate appointing an individual the general guardian of the infant. *People v. Kearney*, 31 Barb., 430.

An infant can maintain an action for use and occupation, although he has a general guardian. *Porter v. Bleiler*, 17 Barb., 149, and cases. The act of 1833 of Pennsylvania provides, that "no executor or administrator shall be admitted or appointed by the orphan's court, guardian of a minor having an interest in the estate under the care of such executor or administrator." Held, not necessary, that the land devised to the minor should be placed under the care of the executor, in order to his being disqualified for appointment as guardian of the minor. *Senseman's Appeal*, 21 Penn., 331. See, also, *Sawyer v. Knowles*, 33 Maine, 208.

A guardian of an idiot, appointed in another state, is but the guardian of the person and estate of the idiot within that state. *Rogers v. McLean*, 31 Barb., 304.

Proceedings for the sale of the real estate of a decedent, are regarded as hostile to the heirs, and the sale of real estate to pay debts, by virtue of a surrogate's order, under the statute, is void as to infant heirs, for whom no guardian has been appointed. *Schneider v. McFarland*, 2 Comst., 459. The Surrogate should have appointed a guardian.

In Ohio, it is held that, the record of a settlement of a guardian with the Judge of Probate, concludes the guardian, but not the ward. *Davis v. Ford*, Wright, 700.

In the case of *State v. Humphreys*, (7 Ohio Rep., part 1, 223,) it was held that a suit could be maintained on the bond of a guardian, without first having liquidated the account with the principal; but no action can be sustained, while the relation subsists. 7 Ohio Rep., part 2, 104; 2 P. Williams, 119.

The action of account, after the termination of a guardianship, may be sustained in the courts of common law, unless the guardian has accounted in the Probate Court. *Field and Wife v. Torrey*, 7 Vt., 372; 2 P. Williams, 119.

or refuse to elect, the court appoints a guardian. If the infant elect a proper person in the opinion of the court, such person is appointed guardian; but the infant's choice is not conclusive upon the court. For, if the person chosen, in the opinion of the court, be an improper person, the court will reject him; and if the infant will not choose a proper person, the court appoints one. The same method may be pursued, where the mother is living; but I never heard of an instance, in which, if the child chose the mother, his choice was not sanctioned by the court. An infant ward, having no father, may live where he pleases with his guardian; and cannot be removed to his place of settlement; but gains no settlement where he lives with his guardian. But if the father be living, and guardian, he will gain a settlement wherever his father gains one. (1)

When the court appoints a guardian to an infant, under the age of choice, the infant, when he arrives at that age, (and, I presume, at any after time,) may appear before the court of probate, and choose a guardian, which choice will be sanctioned, or not, as the discretion of the court shall direct. But if no choice be made, the guardian first appointed, remains guardian until the ward arrive to the age of twenty-one years. (2)

* The guardian, appointed by the court of probate, [*322]

(1) See note to page 456.

(2) The right of the infant to elect a guardian at the age of fourteen, exists by the common law, and in most if not all of the United States. In Ohio, it is said that the power of the guardian over a minor female, expires when she arrives at the age of twelve years; and if he sell her land after she arrive at that age, without any new appointment under an order of court, such sale is void, for the court have no jurisdiction. *Perry's Lessee v. Brainard*, 11 Ohio Rep., 442; *Maxom's Lessee v. Lowry*, 12 Ohio Rep., 195.

The infant may, when he arrives at fourteen years of age, or afterwards appears in court, and choose another guardian with the sanction of the court, where the court has appointed him a guardian before he was fourteen. But he cannot supersede his guardian so chosen by a new one when his fancy dictates. *Lee's Appeal*, 27 Penn., 229. See, also, *E. B. v. E. C. B.*, 28 Barb., 299. And the surrogate has power, not only to ascertain the quantity, quality and condition of the ward's property, and the balance due him from the former guardian, but to decree and adjudge the time when the person to whom and the manner in which the same shall be paid or delivered over. *Seamen v. Duryea*, 10 Barb., 523; *S. C.*, 11 N. Y. (1 Kern.), 324.

must give bonds for the faithful discharge of his trust, provided the infant has any estate; and is liable to account before the court of probate, both before and after his guardianship has terminated. (1)

At common law, he is, also, liable to an action of account, brought by the minor, before the common-law courts, after he has arrived at the age of twenty-one years. (a) This action, by the ward, is yet in use in Connecticut; but, in England, the practice has been for a long time, for the ward to file a bill in chancery, calling the guardian to an account; and the court takes jurisdiction of this matter, on the ground that a guardian is a trustee; and a court of chancery will always enforce the

(a) Co. Lit., 89.

(1) Rev. Stat. Vt., 1839; 2 Rev. Stat. New York, 160; Mass. Rev. Stat., 1835. In chancery the practice is to require a master's report, approving of the security offered by the guardian before the court will appoint. 2 Kent's Com., 227.

In North Carolina, by the act of 1762, the bond should be made to the justices present in the court, granting the guardianship. *Justices v. Wilson*, 2 Dev., 6. In New York, the guardian is appointed by the surrogate's court, to which court the bond is executed. In Maryland, by the act of 1798, by the orphan's court *Clarke v. Donnell*, 8 Gill & Johns., 111.

The bond given by a guardian in New York, under the act of 1815, cannot be sued until proceedings for an account have been had against the guardian, in chancery. *Salisbury v. Van Hoesen*, 3 Hill, 77.

Whereas, in Tennessee, suit may be brought upon the bond, and the surties reached, before proceedings have been had against the guardian, and the amount due the ward, ascertained by a decree. *The Justices, &c., v. Willis*, 3 Yerg., 461; *Foster v. Maxey*, 6 Yerg., 224.

Where the guardian, having given one bond, and the ward having received a legacy calling for a larger penalty in the bond, gives a second bond, the first and second bondsmen are co-sureties and compellable to contribute in proportion to their respective bonds. *Loring v. Bacon*, 3 Cush., 465.

In an action upon the official bond of a general guardian brought against the principal and surety, in which a part of the breaches assigned are the fraudulent acts of the guardian in proceedings instituted by him for the sale of his ward's real estate, proceedings had before the surrogate for the removal of the guardian and the judgment roll in the action brought by the wards against such guardian and others, in which action it was adjudged that the proceedings for the sale of the ward's real estate were fraudulent and void, and were set aside, are not competent evidence against the surety to prove the guardian's misconduct; the surety being neither a party nor a privy to those proceedings, and not being affected by them. *Clark v. Montgomery*, 23 Barb., 464.

faithful discharge of a trust. In this court the guardian is examined, under oath; and is compelled to produce books, and other written documents, that may lead to a thorough investigation of the case and a just decision of the controversy; (a) and this court will compel the guardian to account annually, if there be any apprehension of failure on the part of the guardian. (1)

In Connecticut, it is not usual to file a bill in chancery, but to bring an action of account: but I can see no objection to such a practice, if the case should arise where the action of account

(a) 1 Bl. Com., 463; 2 Bac., 672, 697; Co. Lit. 88.

(1) *Earl of Pomfret v. Lord Windsor*, 2 Vea., 484. If the property of the ward is destroyed through inevitable accident, the guardian will not be chargeable with the loss. 8 Co. Rep., 84. But the court will use diligence in protecting the interests of the infant. *Jenkins v. Walter*, 8 Gill & John., 218; *Say's executors v. Barnes*, 4 Serg. & Rawle, 114.

Ignorance of duty on the part of the guardian, through which the interests of the minor have suffered, is within the definition of misconduct, and is ground for his removal. *Nicholson's Appeal*, 20 Penn., 50.

The guardian being considered merely an officer of the court, will be at all times liable to account. *In re Burke*, 1 Ball & Best., 74.

And a guardian is held, to be bound by the covenant, in a conveyance of his ward's real estate. *Whiting v. Dewey*, 15 Pick., 428. And held, also, liable on promissory notes given as guardian. *Forster v. Fuller*, 6 Mass., 58.

A settlement between guardian and ward soon after the latter becomes of age, and before opportunity exists to become familiar with the condition of the estate, is to be regarded with a jealous eye. Courts will not allow such transactions to stand, unless the circumstances demonstrate, in the highest sense of the term, full deliberation and good faith. *Hawkin's Appeal*, 32 Penn., 263. If the guardian, in the settlement of his account, omit an entire item which he ought to have credited to his ward, that settlement will not protect him from liability in his next settlement to account for such item. *Starett v. Jameson*, 29 Maine, 504. And a release by a ward within four months after becoming of age, and a subsequent confirmation of the guardianship account and payment of the balance, are no bar to a bill of review to charge the executors of the guardian with an item omitted from the account. *Stanley's Appeal*, 8 Penn., 431. See, also, *Neimley's Appeal*, 8 *ibid.*, 457. Guardians are liable for wilful default or gross negligence; but they are allowed the exercise of reasonable discretion and prudential care in managing the property of their wards. Therefore were a guardian permitted the rents of a small property to be received by the widow and the share of the ward in the rents to be applied by her to the maintenance and education of the ward, who was her son, and was residing with her, the guardian is not accountable to the ward for the rents, the said rents being not an unreasonable provision for the purpose. *Eyster's Appeal*, 16 Penn., 372.

would not be as extensively remedial as a bill in chancery. There are not, it must be admitted, as strong reasons for going into chancery here, as in England; for our statute has rendered the action of account more remedial and less perplexed than this action is at common law. Whenever a guardian is sued as bailiff, his appointment as guardian, and his undertaking the trust, is sufficient evidence to warrant a judgment of *quod computet* against him. The case then goes before auditors who have [*328] power to summon the parties before them; and if the guardian do not appear, the auditors may render * judgment against him for the whole demand of the plaintiff, without any investigation of the demand; and if he do appear, he must answer upon oath, to all such interrogatories as are put to him; and if he refuse to do this, the auditors may imprison him. A court of chancery in England can compel a guardian to account as often as the court chooses. (a) A court of chancery in England, and the court of probate in Connecticut, in the exercise of their powers of removal, will remove a guardian for any abuse of the person of the ward, as well as for misconduct respecting his estate; also when any event renders him incompetent to manage the concerns of the ward, as lunacy, gross intemperance, or other profligate immorality, or bankruptcy: (b) but they will never remove a man whose character for integrity is fair, merely on the ground that he is probably in failing circumstances, if he will find surety to secure the interest of the ward. In Connecticut, such surety is unnecessary, if the bond, given for the faithful discharge of his trust, remain good. (1)

(a) 2 Mod., 177; 2 Bac., 279.

(b) 1 P. W., 706; 1 Ves., 160; 1 Salk., 44; 2 Mod., 177.

(1) 2 Kent's Com., 229. In Vermont, although the courts of probate have power to remove a guardian, yet their proceedings in this behalf are subject to the revision of a higher court. *Pepper v. Stone*, 10 Vt. Rep., 427. There are some acts which, *ipso facto*, extinguish the power of the guardian, as for instance, the marriage of a *tenne sole* guardian. *Field et ux. v. Torrey*, 7 Vt. Rep., 372.

* CHAPTER III.

[*824]

OF THE PARTICULAR DUTY OF A FATHER, WHEN GUARDIAN; AND OF THE MOTHER, WHEN GUARDIAN. OF THE MANNER IN WHICH THE GUARDIAN MUST MANAGE THE ESTATE OF THE WARD.

No guardian is bound to maintain his ward at his own expense, except when he is a father; but whatever expense he is at for the ward's maintenance, the guardian shall be reimbursed out of the ward's estate. If the father be guardian, he must support his child, if of sufficient ability; but he is not bound to give him an expensive education: but if he do, it is not uncommon for a court of chancery to allow the father a reward out of the ward's estate. This, however, will depend upon the circumstances of the father. If he be a man of wealth, and the education is not more expensive than is correspondent with his circumstances, and such a one as in that respect it was proper for him to have afforded to his child, if his child had been destitute of property; the court will, in such case, make no allowance to him out of the ward's estate. It is not, therefore, a matter of course, that an allowance will be made to the father in such case. The safest way for such a guardian, is for him to apply to chancery in the first instance, and procure the sanction of that court for the expenditures he is about to make. (a) If the mother be the guardian, by nature, there is no obligation on her, when her ward has estate sufficient to maintain him: her expenditures for maintenance and education will be allowed; and whatever chancery does in these respects, * I apprehend may be done in [*825] Connecticut by the court of probate. (1)

(a) 1 Br. in Can., 397; 1 Ves., 160; 2 Vent., 353; 2 Ver., 187, *id.*, 265; 2 Atk., 399.

(1) The allowance to the father of a sum out of the ward's estate, in payment of his support of the ward, seems to be entirely discretionary with the court of chancery or the probate court; and in the exercise of this discretion, they will have reference to the estate of the ward, and the circumstances of the father. It is said in the text, that if the mother be the guardian by nature, there is no obligation of

When any money is paid, which is due on a mortgage, an infant mortgagee may reconvey, and the conveyance is valid, on the principle that such infant is compellable in equity to reconvey; and if he do that without compulsion, which he is compellable to do, it shall be deemed valid. (a) So, too, his deed of partition is valid on the same ground. In Connecticut, by statute, his guardian is empowered to convey, in both those cases: but this provision, I apprehend, does not proceed upon the ground that such conveyance by a minor would be invalid; but it was enacted to extend the remedy. It would often happen, that the infant mortgagee, or infant tenant in common, was of such tender years, that he could not perform the corporal act of executing a deed; and the reason why it should be done, was as obvious in such case, as where he could execute a deed. (1)

It is a principle that the guardian is not to reap any benefit from the use of the ward's money. (b) If any benefit have been received from the use of the ward's money, the ward is to receive that benefit. If the guardian should pay a debt due from the ward, by a compromise with the creditor, with a sum smaller than the debt, the ward must have the benefit of such compro-

(a) 3 Bur., 1794.

(b) 2 Comy., 230; 2 Ch. Ca., 245.

this kind upon her, when the ward is possessed of sufficient estate for its maintenance. This may be true, though it has been held that the presumption arising from the mother's maintenance of her child, is, that such maintenance is intended as a gift, and the circumstances of the mother's having no property of her own, and of the child's having an estate and guardian, are not sufficient to rebut the presumption. *Cummings v. Cummings*, 8 Watts' Rep., 367.

It is the duty of the general guardian of an infant to provide for the support, maintenance and education of the infant out of his estate, notwithstanding the infant has a father living, provided the father is poor and unable to support him. *Clark v. Montgomery*, 23 Barb., 464. A guardian is entitled to credit for moneys advanced to his ward to enable him to complete a medical education. *Smith's Appeal*, 30 Penn., 397. But when a guardian advances money out of his own pocket for the erection of buildings upon the land of his ward, without the order of the court, he cannot recover the amount from his ward. *Hassard v. Rowe*, 11 Barb., 22.

(1) This power of the guardian to convey seems to be entirely unnecessary, for it is well established that the infant may discharge a mortgage upon full payment of the mortgage-debt. 3 Kent's Com., 342. So, being a tenant-in-common, he is by law capable of making a reasonable partition. *Barrington v. Clarke*, 2 Penn. Rep. 115

mise. The guardian ought to put out the ward's money at interest, if he can; and if he do not (as the presumption is that he can do it), he must show that he could not. If he put the ward's property in the public funds, or at private interest, the guardian discharges his duty, unless he is guilty of negligence by placing it in the hands of an improper person. (1)

(1) The office of a guardian is one of obligation and duty, and not of speculation and profit. 2 Kent's Com., 229. He is appointed to keep his ward's funds safely, and to render them productive; and if he fails to invest them profitably when he can do so, he is to be charged with interest. *Armstrong v. Miller*, 6 Ohio Rep., 118; *Baker v. Richards*, 8 Serg. & Rawle, 12. The court of chancery is always watchful of the interests of its wards: it will give them one year after they become of age to examine the accounts of their guardians, and the guardian will not be entitled to a discharge before the expiration of that time.

The guardian will be charged with interest for all funds in his possession, a reasonable time being allowed for investment. *Kane v. Karr*, 6 Dana (Ky.) Rep., 3. And it was further held, in this case, that he would not only be chargeable with interest on the principal, but on the interest received by him and not appropriated to the support and education of the ward; and periodical rests were adopted for compounding the interest. These rests were not longer than two years.

But in Mississippi, *Hendricks v. Huddleston*, 5 Smedes & Marsh, 422, it was held that a guardian is not chargeable with interest for money in his hands, unless he has consented to take the money at interest, or unless it has been loaned out at interest under the direction of the court.

In Missouri, under the Spanish laws, it appears that a guardian might purchase the lands of his ward, by permission of the judge. *McNair v. Hunt*, 5 Mo., 300.

A guardian without funds in his hands may lawfully become the purchaser for his own use of his ward's real estate, sold by the sheriff under a judgment against the personal representatives of the ward's ancestor. *Chorppening's appeal*, 32 Penn., 315. A purchase, by a guardian *ad litem* of infant parties to a partition suit, of lands sought to be partitioned in such suit, at a sale thereof by a referee, which purchase is not made for the benefit or in behalf of such infants, is void. *Lefevre v. Laraway*, 22 Barb., 168. Where an administrator is permitted by the guardians of minor children of the intestate to receive the rents of real estate, whether expressly authorized to do so or not, the guardians are liable to account for the same to the wards. *Wills' appeal*, 22 Penn., 325. It is the duty of a guardian to get possession and control of his ward's personal property, and the rents and profits of his real estate; to keep and protect the same; to keep it invested, and to render a just and true account thereof on the ward's becoming of age. *White v. Parker*, 8 Barb., 48. An investment by a guardian or other trustee, unless authorized by the deed of trust or by law, in the stock of an incorporated company, is at his own risk, even though persons generally considered men of prudence have made similar investments. *Worrell's appeal*, 23 Penn., 44. And an investment in bank stock of his ward's money by a guardian in his own name, though personally

The guardian has no authority to purchase real property for the ward, with the ward's money. If he do, the ward, when he arrives at the age of twenty-one years, may elect to take the [*326] lands, or may refuse to take them, and demand* his money, with interest; and, in the last case, chancery will consider the ward as trustee of the lands for the guardian, and will direct the ward to convey the lands to the guardian. (a) (1) If the guardian should put the ward's money into trade, the ward, when he arrives of age, may demand his money with interest, or may elect to have the profits of the trade. (b) This right of election dies with the ward; for, if he should die without making an

(a) Ver., 435.

(b) Ver., 435.

authorized to invest in bank stock, makes himself liable. *Stanley's appeal*, 8 Penn. 431: see, also, *Hutchinson v. Hutchinson*, 19 Vt., 437. A note, taken by a guardian upon a loan of his ward's money, and payable to the ward or bearer, may be retained by the guardian as his own property or transferred to a third person, and the amount otherwise accounted for, or the guardian become a debtor for the amount to his ward. *Fletcher v. Fletcher*, 29 Vt., 98. A guardian can be protected only in an investment of his ward's money in *real or government securities*, without the authority of the court. *Ackerman v. Emott*, 4 Barb., 626.

A guardian should keep his ward's property separate from his own; otherwise he will make it his own so far as to be accountable for its loss. *White v. Parker*, 8 Barb., 48. One guardian remains liable for assets which were once in his hands, but which he had voluntarily delivered over to his co-guardian. *Clark's Appeal*, 18 Penn., 175.

(1) It has been intimated, and in one or two instances held, that the guardian may, in a strong case, change the property of the infant from personal to real, without a previous order of a court of competent jurisdiction. 2 Eden's Rep., 152, 153; 1 Rawle's Rep., 266. The exercise of this power, however, if it exists at all, is very hazardous on the part of the guardian, and not to be recommended. Indeed, the balance of authorities seems to be against the power of its exercise at all. The court of chancery undoubtedly has power thus to order this change, and will so order it, whenever it is apparent that it is for the infant's benefit. *Ashburton v. Ashburton*, 6 Ves., 6; 3 John. Ch. Rep., 343, 370. Where the guardian performs this act without the order of court, the ward will generally have the right, on coming of age, to elect to ratify the act of the guardian, or refuse to do so, and require the restoration of the property to its original form. 2 Kent's Com., 230; *White v. Parker*, 8 Barb., 48; *Rogers' appeal*, 11 Penn., 36.

The conversion of real into personal estate cannot be done, unless with the aid of a court properly constituted. *Merchant v. Sunderlin*, 3 Ired., 501; *Ex parte Crutchfield*, 3 Yerg., 336; *Cochrane v. Van Surley*, 19 Wend., 365; *Miller's estate*, 1 Penn. State Rep., 326; *Stall's lessee v. Manchester*, 9 Ohio Rep., 19-21.

election, it is not in the power of the heir to elect; for, on the death of the ward, the personal property vests in the executor; and such property in the hands of the guardian is personal until the ward has, by his election, turned it into real; it then vests, therefore, in the executor of the ward, a right to demand of the guardian the money with interest. It would be unreasonable that the heir should have this power of election, and by this means disappoint the just expectations of creditors, legatees, or those who are entitled to a distributary share under the statute (a) (1)

When personal property of the ward comes into the hands of a guardian, which is not money on interest, it is a general rule that the guardian ought to sell it, and put it at interest; or, if there are debts which the ward must pay, he ought to apply it to the payment of debts; for such property produces no interest, whilst the debt of the ward is increasing, by reason of the accumulating interest. (2) This will not apply to every species of property. It is not usual to sell family pictures, plate, watches, ornaments, &c.; but to keep them (as they are not of a perishable nature), by which to remember their former proprietors; nor would it be improper, in other cases, to preserve other property; as where a ward was nearly of age, and soon to enter upon a farm well stocked, which was his property; the guardian would be justified in not selling this stock.

(a) 1 Ver., 406; *id.*, 536.

(1) *Docker v. Some*, 2 Mylne & Keene, 665.

(2) The principle here laid down is established and sustained by numerous authorities. It will apply, not only to guardians, but to trustees of various other descriptions. *Bax v. Villers*, 11 Price's Rep., 575. And the doctrine pervades all the following cases, with some differences upon minor points, as they have been agitated before various courts: *Rogers v. Rogers*, 1 Hopk. Ch. Rep., 515; *Smith v. Smith*, 4 John. Ch. Rep., 281; *Evertson v. Tappan*, 5 *id.*, 497; *Clarkson v. De Payster*, 1 Hopk. Ch. Rep., 424; 5 Conn. Rep., 475; 2 N. H., 218.

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•CHAPTER IV.

OF THE POWER OF THE COURTS OF CHANCERY RESPECTING THE MARRIAGE OF THEIR WARDS. OF THE EFFECT WHICH THE MARRIAGE OF A FEMALE WARD HAS ON HER GUARDIAN'S POWER OVER HER PERSON AND ESTATE, BOTH WHEN THE HUSBAND IS AN ADULT AND WHEN HE IS A MINOR. OF THE EFFECT WHICH THE MARRIAGE OF A MALE INFANT HAS UPON THE GUARDIAN'S POWER OVER HIS PERSON AND ESTATE.

THE power of the court of chancery in England, to restrain the marriage of wards, is very extensive. It is not uncommon for this court to forbid the marriage of a ward, unless the guardian consents thereto; and frequently they forbid it if he should consent; for he may consent to answer interested purposes of his own, and thus be accessory to the disparagement of the ward. And while there is a well-grounded suspicion of disparagement of the ward by the guardian, this court will not only forbid the marriage, but will take the ward out of the hands of the guardian; and every person, who is concerned in the marriage, after this prohibition, will be considered guilty of a contempt of court. When the father is guardian, they do not take the ward from him. (a)

In chancery, the guardian is viewed as trustee of the minor's person and estate; and that court will not suffer him to abuse his trust, but will compel him to perform it with fidelity. At law he is considered as a bailiff, and is liable to account. Marriage by a ward, in all instances, affects the rights of a guardian, more or less. If a female ward marry, the guardian's power must cease, both as it * respects her person and property. [*328] This, I apprehend, has never been questioned, when she married an adult; for such husband has a right to her person, with an uncontrollable right to her property. If she marry a minor, it seems to be admitted that the guardianship of her per-

(a) Tal. Ca., 58; 1 P. Wms., 502; 2 id., 112; 1 Ves., 100; 3 Atk., 314.

son ceases; for she has contracted a relation inconsistent with the power of a guardian over her person; for her husband was of age to contract marriage; and acquired the same right to her person that any husband acquires to the person of his wife. There has been some difference of opinion with respect to her estate. The better opinion is, that her estate is, by marriage, transferred to the minor; for his marriage is as effectual as the marriage of an adult; and all the same consequences follow. The personal property of the wife, in possession, becomes his absolutely. If choses in action, they are at his control. If real property, he is entitled to the usufruct. Her rights are passed to her husband; and her guardian can have no further control over them. If a male ward marry, I apprehend he has contracted a relation, and one that he had a right to contract, wholly inconsistent with a guardianship of his person. As to his estate, marriage does not vary his situation. His guardian retains his usual power over his estate; and, if he married a female ward, as her property has become his, his guardian's power extends to that also. (1)

(1) Some of the older cases have gone the length that chancery would take the ward from the custody of the guardian whenever the habits and character of the guardian appear to be such as to render him unfit to protect and guard the interests of the ward, and even that the child would sometimes be taken from the custody of the father, as when he was an avowed atheist, and lived in a state of adultery. *Shelley v. Westbrook*, Jacobs' Rep., 267: see, also, *ex parte Warner*, 4 Brown's Ch. Rep.; *Whitfield v. Hales*, 12 Ves., 492; 3 Russ. Rep., 1; 10 Ves., 52; 5 East. Rep., 1. The doctrine, that the authority of the guardian over the estate of his female ward ceases upon her marriage, has been recognized in the United States. *Kettletas v. Gardner*, 1 Paige's Rep., 488; in the matter of *Whittaker*, 4 John. Ch. Rep., 378. The marriage does not, however, *ipso facto*, determine the authority of the guardian. An order of court, transferring the custody of the property to the husband, is first necessary; though the husband will be entitled to such order, upon motion. 4 John. Ch. Rep., 378: see, also, *Leuder's case*, Orphans' Court, Philadelphia, 1822, cited in *Wharton's Digest*, tit. Infant.

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* CHAPTER V.

OF THAT POWER WHICH CHANCERY EXERCISES OVER THE GIFTS AND CONTRACTS OF WARDS, MADE WITH THEIR GUARDIANS, SOON AFTER THEY COME OF AGE. OF THE GUARDIAN'S POWER, UNDER ANY CIRCUMSTANCES, TO INVEST THE PERSONAL PROPERTY OF THE WARD IN LANDS, OR TO TURN THE REAL PROPERTY INTO PERSONAL. WHETHER THE LAW ON THAT SUBJECT IS APPLICABLE TO OUR COUNTRY. SOME OBSERVATIONS ON THE POWER OF GUARDIANS IN SOCAGE, AS TO PERSONAL PROPERTY.

A COURT of chancery has often protected the interest of the ward, after he has come of age; setting aside his gifts to his guardian, as a reward for his services, and annulling a release given by the ward to the guardian, by which instrument the guardian was discharged from accounting with the ward for certain property of the ward's, which was in the guardian's hands. Such interference by chancery has ordinarily taken place where such gifts and release, &c., have been made just after the ward was twenty-one years of age. The principle which governs in cases of this kind, is, to secure the ward against his own indiscretion, where the guardian, taking advantage of the influence which he had acquired over the ward, had induced him to bestow unreasonable rewards upon the guardian, to which he had no legal claim, and which it is not probable the ward would have ever given, had it not been for the powerful influence that the guardian had obtained over him. So, too, in those cases where the * ward has been induced to release the guardian from any further claim upon him, when he has not rendered any regular account; the ward, in his unbounded confidence in the guardian, trusting to his integrity to say what was equity betwixt them. Such transactions are viewed with a jealous eye by a court of chancery, and by that court considered as unfair, and in pursuance of a well established maxim in that court, that taking an undue advantage of the situation of a per-

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son, is such a fraud as that the court will set aside, the transaction. This is perfectly analogous to what that court does in other cases. (1)

This maxim, with others, contains the principle on which the purchases of the expectancies of young heirs are considered as radically corrupt. Such purchasers, finding inexperienced young men under the government of their vices, which demand greater expense for their gratification than they have the means to furnish, unless they sell their expectancies, most readily minister to their passions, by furnishing them with means, by purchasing their expectancies at a rate greatly below their value. On this principle, purchases of sailors, at a price much below the real value of their prize money, have been relieved against. So, too, when the son of a nobleman was induced to give a bond to the man who was his tutor, over whom the tutor had obtained a great ascendancy; the son was a man of weak capacity; the tutor, taking advantage of his situation, obtained from him a bond of one thousand pounds: the court ordered the tutor to release the bond.

On this principle was the case of *Hamilton v. Mohon*, in 1 P. Wms., 118, decided. A gentleman paid his addresses to a young lady of fortune, who was a minor: her mother, who also was a lady of fortune, was her guardian, and, during the minority of her daughter, had received large sums, as the rents and profits of her daughter's * estate. After the mother found that the affections of her daughter's suitor were placed upon [*331]

(1) Chancery will always exercise great diligence in protecting the interests of wards, and especially when those interests come in conflict with those of the guardian. *Jenkins v. Walter*, 8 Gill & John., 218; *Elliott v. Elliott*, 5 Binn. R., 8; *Say's Executors v. Barnes*, 4 Serg. & Rawle, 114. The more effectually to prevent any imposition upon the ward, it is the constant practice of the court of chancery to allow him one year after he becomes of age, to examine and investigate his guardian's accounts, and falsify them if they be wrong. The guardian cannot compel him to a settlement, nor procure an absolute discharge before the expiration of that time. In the matter of *Van Horne*, 7 Paige's Ch. Rep., 46.

Where, in his minority, a ward submitted a claim to arbitration, and on an award being made in his favor and paid to his guardian, his receiving the money from his guardian after his attaining his full age is an affirmance of the submission, and will bar the claim. *Jones v. Phoenix Bank*, 8 N. Y. (4 Seld.), 228.

the daughter, she informed him, that unless he would release her from all liability to account for the profits and rents of her daughter's property, which she had received, she would endeavor to prevent his marriage with her daughter. He, fearing the effects of the mother's influence over her daughter, artided with the mother, that, after marriage, he would release her from all accounts of the meane profits of her daughter's estate. Equity relieved against this agreement, upon the ground that the mother had attempted to take an undue advantage of his situation, by operating upon his fears to enter into a contract that never would have been made, if she had not improperly excited those fears: but, when no advantage is sought, and after the ward is in possession of his estate, and no influence exerted over him, with a full knowledge of the state of his affairs, he makes a reasonable grant to his guardian for his fidelity and care, equity will not interfere. Cases on this subject are to be found, 1 P. W., 120, Cox's notes. 2 Ves., 547; 1 *ibid.*, 879; 9 *ibid.*, 292, 182.

In the case of *Older v. Sansborn*, 2 Atk., 15, it was contended, that where a guardian, immediately on the ward's coming of age, purchased of the ward his estate, that the contract ought to be annulled; but Lord HARDWICKE said, that as it appeared that the guardian had paid a full consideration, the purchase could not be set aside. From this determination it is fairly inferable, that if the price had been inadequate, the purchase would have been set aside, on the ground that the guardian had made an unfair use of his influence over the ward. Sugden, in his law of Vendors, states the above case, and then makes this observation, viz.: "But it seems clear, that such a purchase would now be set aside, without reference to the adequacy of the consideration." This * opinion is not supported by any authority [*332] cited; and to me it is inconceivable why a fair contract, such as the one stated, that this, where a full consideration has been paid, should be set aside. The only reason that can be given why a contract betwixt a guardian, and ward, who is of age, should be set aside in any case, is, that in that case the guardian had obtained an advantage from the ward, by an improper use of his influence, which furnishes ample ground for

the interference of equity; and where it appears, from the price given, that no undue influence has been exerted, why should the contract be set aside? (1) It is a maxim in equity, that whosoever enters on the estate of an infant, even though he is a tortfeasor, may be considered by the infant as guardian, or bailiff, and in that character be compelled by chancery to account with the infant. 8 Atk., 180.

By the common law, guardians, who have a right to the possession of the lands of their wards, during their minority, and continue in possession after their wards have arrived at full age, without license from their wards, were not trespassers. In England, and some of the states, they are made trespassers by statute.

In a case reported in 8 P. W., we find the testator, who was a Presbyterian, appointed by his will, his three brothers, A, B, and C, who were Presbyterians, and also D, who was an Episcopal clergyman, guardians to his three daughters, E, F, and G. On the decease of the testator, D got into his possession F and G, and put them to school, where they were bred up in the way of the Church of England. E was living with A, one of her guar-

(1) That a valid contract may be made between guardian and ward, shortly after the ward attains his majority, can hardly be doubted. The contract must be untainted with fraud or imposition, on the part of the guardian, and this is all that is required. It is believed that in nearly all the cases where these contracts have been set aside, it has been upon the ground that some unfair advantage had been taken of the ward, and not because the contract, from its nature, is opposed to the spirit of the law. Thus, in the case of *Dawson v. Massey*, 1 Ball & Beatty, 219, where a lease, obtained by an uncle from his nephew, but just of age at the time of its execution, and to whom he had been guardian and agent, was set aside; it was upon the ground that it was made at an under value, and other considerations than the reserved rent were held out, for which no security was given. The case of *Hatch v. Hatch*, 9 Ves. Rep., 392, referred to in the text, proceeded upon the same principle, and is an instance where such a conveyance was set aside upon grounds of public policy, after a great lapse of time. But *Aylward v. Kearney*, 2 Ball & Beatty, 483, seems to favor an opposite doctrine. In this case, the guardian obtained a lease of land from his ward, shortly after he became of age. The rent reserved seemed to be adequate, and afforded a fair consideration. But notwithstanding this, it was set aside after a lapse of thirty years; the ward being of weak understanding, and continuing during his life under the pupillage and influence of the guardian and his family.

diana. D filed a bill in chancery, to have E taken from A, her uncle, to be put to school, where she might be educated in the religion of the Church of England; and thereupon A, B, and C filed their bill to have F and G taken from D, and delivered to them, [*333] that they might * be educated Presbyterians; insisting upon it, that it was the desire of their father, who was a Presbyterian, that they should be so educated; and offered parol proof that it was the declared intention of the testator that they should be educated in his own religion. The court refused to receive this parol testimony, declaring that it was no more to be admitted in a devise of a guardianship, than it was in a devise of real estate. This decision, I apprehend, was correct; and the court refused to take F and G from D, and they, also, refused to take E from her uncle A. Notwithstanding the correctness of the judgment, which rejected the parol testimony, I think it very questionable whether the final judgment was correct; for, if the court could get at the intention of the testator, without resorting to parol testimony, that intention, being a lawful one, ought to be carried into execution, unless the legal rights of some person would have been violated by so doing. In the case before the court, there could not have been any legal right violated; for, it is an established rule in chancery, if there are more than one testamentary guardian, and they disagree as to the course of conduct to be pursued respecting their ward, the guardianship of the ward devolves on the court; so that the right acquired by D under the will, by having gotten F and G into his possession, was at an end. The only remaining inquiry for the court, was, what was the intention of the testator respecting the education of his children; and could not this be collected from facts *dehors* the will? Not indeed from the declared intention of the testator; for this were not admissible; but from facts from which it was fairly inferable what the testator's intention was. For no point, perhaps, is better established, than that such testimony may be resorted to, to get at the intention of the testator, if such facts stand with the will. And would not the fact that the testator [*334] * was a staunch Presbyterian, as the report says, furnish evidence that he would wish that his children should be

Presbyterians? All experience teaches us, that this, most probably, must have been his intention. In addition to this, he appointed three brothers the guardians of his children, who were Presbyterians, and who, he knew, would, if the education of his children was left to them, educate them Presbyterians; and it could hardly be supposed, that one guardian out of four, would have attempted to oppose the other three, because they wished to educate the testator's children in that religion which he believed to be correct.

It is the law of the books, that a guardian cannot change the property of the ward; that is, he cannot invest personal property in lands, or turn real property into personal. The principal reason alleged, why he may not invest personal property in lands, is this: that it will alter the succession of this property, in case of the minor's death, during his minority; for, if the property had not been changed, it would have been, in that event, distributed to his personal representatives. But if it was converted into real property, it would have descended to his heir. So, too, if real property should be converted into personal, it would be distributed to his personal representatives; but, if it had remained real, it would have descended to the heir-at-law. This reason ceases to be of any weight in these states, where the personal and real property go, on the death of the owners, to the same person; that is, whoever are heirs to the real property, are heirs (to use an improper word) of the personal property. There is another reason alleged, in the case of converting personal estate into real, viz., that the minor can devise his personal property before he is of the age of twenty-one years; but real property, he cannot. Thus, by converting his personal estate into real, he is deprived of * the privilege of devising such property, before he is of the age of twenty-one years. This objection does not exist in the case of converting real property into personal: and, it seems to me, the argument in case of personal property, is of little moment; and, I believe, would not have been thought of, had there not been the other reason before stated, to which this is added as an auxiliary. It is apparent, that many cases may exist, where it would be very desirable to vest the personal property of the minor in real property. Opportunities frequently

occur, in this country, where the minor's estate would be greatly benefited, if this was practicable; and the principal, and, I think, the only reason to be regarded, why this may not be done, has no existence in this country; and, in case of a power residing in the guardian to convert real into personal property, it would prevent frequent applications to the legislature to vest the guardian with such power. And why a guardian should not be entrusted to manage the estate of the minor in this way, when he judges it beneficial to the minor, it is difficult to conceive; since the estate is placed in his hands, and his integrity, in this respect, is secured by a bond, as well as in all other cases, and he is always liable to the minor for any mismanagement. The English doctrine, on this subject, is to be found in Pow. on Con., 273; 1 Ves., 401, 435, 461. (1)

. In 3 P. Wms., 151, the Chancellor decided, that a father is entitled to the custody of his own child during infancy. It is a case in which there existed some reasons why the child should remain where she was, in the custody of a relative; especially, as she declared in court, that it was her choice to remain where she was. (2)

(1) Guardians are generally subject to the same rules as other trustees, and the doctrine, that a trustee cannot convert a trust-fund of money into land, or real estate into personal, is well settled. Generally, if the trustee does invest such fund in real estate, the *cestui que trust*, may, at his option, accept of the lands, or refuse them and demand his money. That a guardian is so far subject to this rule, that he cannot thus change the property of his ward without the authority of court, is also well settled. Bonsall's Appeal, 1 Rawle's Rep., 273; Taylor v. Galloway, 1 Ohio Rep., 232; 2 Kent's Com., 230. But the court of chancery will sometimes direct this change to be made, when it is manifestly for the infant's benefit. Inwood v. Tyne, Ambl. Rep., 419; Hedges v. Bicker, 5 Johns. Ch. Rep., 417; Huger v. Huger, 3 Desaus., 18. In some of the states there are statute provisions for the sale of an infant's lands, when such sale is required for their benefit. R. S., Mass., 1835, part 2, ch. 71, 72, tit. 5; Stat. Ken., 1813; 2 R. S., N. Y., 194. Judge Kent is of the opinion that the property may be changed from personal to real, in a clear and strong case, by the guardian without the previous order of chancery, but admits that it is an extremely perilous act in the trustee, and cannot be recommended. 2 Kent's Com., 230; 2 Eden's Rep., 152; Ambl., 419; and 1 Rawle's Rep., 266, are cited as authorities sustaining this proposition.

(2) It is now, however, firmly established by the decisions, that the court of chancery has power to take the child from the custody of the parent, and the books furnish many instances of its exercise. Where he was an outlaw, residing abroad is

An infant can bring no action of account against a guardian, during the continuance of guardianship; but, in equity, by his [*336] *prochein ami*, he may file his bill for an *account whilst the guardianship continues. 2 Ver., 342; 3 P. Wms., 119; 3 Atk., 25; 1 Ves., 91. (2)

It has been made a question, whether a guardian in socage was entitled to the custody of the personal estate of the ward. It is said, in some of the elementary writers, that he is. I have never seen any authority which supports this opinion; and it is, in Vaug., 156, expressly laid down, that he has not, by law, the custody of his ward's personal property. If a father exercises his right to appoint a testamentary guardian, then the right of the guardian in socage is superseded. The guardianship in socage does not cease, of course, on arriving to the age of fourteen; for, if no other guardian succeeds, the guardian in socage continues. Andr., 313. The mother may be guardian in socage to her minor

embarrassed circumstances; imprisoned for cruelty to his wife; a man of irreligious habits and living in adultery with a prostitute; had maltreated his children, &c. In all these cases he has been deprived of their custody. *Cruise v. Hunter*, 3 Br. Ch. Rep., 590; *Ex parte Warner*, *ibid.*; *Wellesley v. Duke of Beaufort*, 3 Russ. Rep., 1; *Shelley v. Westbrook*, Jacob's Rep., 267; *Whitefield v. Hales*, 12 Ves., 492; See, also, *Lyons v. Blenkin*, Jacob's Rep., 270, in note: *De Manneville v. De Manneville*, 10 Ves., 52; *Wood v. Wood*, 3 Alabama Rep., 758.

At common law, a father has the paramount right to the custody and control of his minor children, and to superintend their nurture and education. The same rule exists in New York. But this superior legal right of the father is subject to the control of the court in two cases, 1st. Where the father has abused or forfeited the right by cruelty or misconduct towards the child, or his character is such, or he has been guilty of such conduct, that the welfare, either physical or moral, of the child, requires that such child be removed from the father. 2d. When the father and mother are living separate from each other under circumstances such as would warrant the court in granting a divorce *a mensa et thoro*, and the welfare of the child requires that it should reside with its mother. *People v. Olmstead*, 27 Barb., 9; *People v. Humphreys*, 24 Barb., 521; *State v. Richardson*, 40 N. H., 272. Nor will the action of the court be controlled by the wishes of a child of tender years (10 years of age in this case). *State v. Richardson*, *supra*.

(2) By the common law, the guardian is accountable to the infant when he arrives at the age of fourteen years, and may be called to account at any time after. *Bac. Abr.*, tit. Guar., I. The court of chancery will permit a stranger to come in and complain of the abuse of infant's estate by the guardian. *Earl of Pomfret v. Lord Windsor*, 3 Ves., 484.

son; and, where she continues in possession of her husband's estate, after his decease, she is considered as guardian in socage to her infant son. She never could be, in most of these states, guardian to her son, because, by possibility, the estate may be inherited by her. In the State of New York, she cannot inherit to her child's estate; and, of course, she may be guardian in socage. The rule that guardianship does not cease, on the ward's coming to the age of fourteen, if no other guardian succeeds him, that is, if the ward does not improve his privilege of electing a guardian; seems to be established; yet it seems, where this is not the case, the guardianship does not prevent him from entering and taking the land to himself. *Rayner v. Van Heusen*, 5 Johns., 66, before the supreme court of New York. (1)

If the property of the ward is lost in the guardian's hands, without any fault of the guardian, or where he was robbed of the property of the ward, the guardian will be discharged, on showing this. (2)

ADDENDA.

* 1st. A testamentary guardian cannot make a lease [*837] of the ward's land. A lease so made by him is utterly void: but a guardian in socage has power to make such leases 2 Wils., 129, 135.

2d. A mother cannot appoint a guardian by will to her child. *Vaug.*, 180; 3 *Atk.*, 519.

3d. A court of chancery never appoints a guardian to a female infant, after her marriage. 1 *Ves.*, 157.

4th. Though a guardian cannot purchase lands for his ward, and compel the ward to take them; yet this may be done under the direction of a court of chancery. 1 *Ver.*, 408, 435.

(1) We have already seen that a guardian in socage can scarcely exist in the United States, as the guardian must be a person who cannot by any possibility inherit the ward's estate. *Ante*, page 313. This species of guardianship was once common in New York, but has now become nearly obsolete. It is not, therefore, deemed necessary to collect the cases discussing the question of the authority of such guardian over the estate of the ward.

(2) *Bac. Abr.*, tit. *Guar.*, 1; 8 *Coke*, 84.

5th. If a guardian commit waste upon the estate of his ward, upon application by a *prochein ami* of the infant, an injunction will be granted by a court of chancery.

6th. If any person marry a ward when the guardian has been appointed by a court of chancery, without the consent of the guardian, it is a contempt of court; but no contempt, if he be not a guardian appointed by the court. 2 P. W., 111, 562.

7th. When a man is sued, he may plead in abatement, or bar, that he never was a guardian; or he may plead thus, that he was guardian at such a time, and that he has rendered an account since, and traverse his being guardian before or after. Rast. Ent., 21.

MASTER AND SERVANT.

[*339]

* CHAPTER I.

OF SLAVERY, AS IT ONCE WAS IN CONNECTICUT. OF APPRENTICES.

A MASTER is one who, by law, has a right to a personal authority over another; and such person, over whom such authority may be rightfully exercised, is a servant. At common law, this right in a master, originates in some compact made with the servant, or with some person who has a right to command him. This is not, however, perfectly correct; for, in many of those states, where there is that species of servants, called slaves, the right to them is not founded on compact, in those states; that is to say, in most of them. There are five kinds of servants, viz.: slaves, apprentices, menial servants, day laborers, agents of any kind; and in Connecticut, there is a sixth; debtors assigned in service to pay a debt. The last and the first are not known to the common law. The law, as it respects slavery, generally, will not be noticed in this chapter; nor any of those arguments urged, that, on the one hand, deny the legality of it, in a moral point of view; or those which assert its legality. I will only observe, that slavery is unknown to the common law in England; for, the moment that a person, who is a slave in any other country, reaches the shores of that country, he is emancipated, and entitled to the same security for life, liberty and property, as any other man; nor can the laws of the country, where slavery is admitted, * be enforced in favor of it. 1 Bl. Com., 424; Co. Litt., 77. When the rigors of the feudal laws prevailed, there was a species of slaves in England, called villeins. The knowledge of the law, respecting

them, has long since ceased to be important; for it is not now known in that country, being abolished by a statute of Car. II, and never was known in this. At present, it is difficult to find, in the State of Connecticut a slave. A statute of this state, previous to March, 1784, was enacted, declaring, that all persons born of slaves, after the 1st March, 1784, should be free at the age of twenty-five; and a subsequent statute enacts, that all so born, after the 1st August, 1797, should be free at twenty-one. These statutes, with a statute forbidding the importation of slaves, by land or water, will, in a short time, put a period to slavery in this state; as those born before 1784, most of them, have been emancipated by their masters, so that scarcely a slave can be found. The law, as heretofore practised in this state, respecting slaves, must now be uninteresting. I will, however, lest the slavery which prevailed in this state, should be forgotten, mention some things, that show that slavery here was very far from being of the absolute, rigid kind. The master had no control over the life of his slave. If he killed him, he was liable to the same punishment as if he killed a freeman. The master was as liable to be sued by the slave, in an action for beating or wounding, or for immoderate chastisement, as he would be, if he had thus treated an apprentice. A slave was capable of holding property, in character of devisee, or legatee. If the master should take away such property, his slave would be entitled to an action against him, by his *prochein ami*. If one should take away a slave from the owner, without his consent, trover could not be maintained; but a special action on the case. From the whole, we see, that slaves had the * same rights of life and property as apprentices; and that the difference betwixt [*341] them, was this: an apprentice is a servant for time, and the slave is a servant for life. Slaves could not contract in Connecticut; for this is specially forbidden by statute.

If a slave married a free woman, with the consent of his master, he was emancipated; for his master had suffered him to contract a relation inconsistent with a state of slavery. The right and duties of a husband are incompatible with a state of slavery. The master, by his consent, had agreed to abandon his

right to him as a slave. So, too, it has been holden, that a minor child is emancipated from his father, when he is married. *Ld. Raym.*, 856. A slave might be sold in Connecticut, and the evidence of the sale must be a bill of sale; and he might be taken in execution, and sold at the post. When it is observed, that slavery is not known at common law, it is not denied that men may be punished with slavery for life, for crimes, with perfect consistency with the principles of the common law. If the legislature can make laws, the transgression of which may be punished with death, they can surely condemn to a loss of liberty. (1) Apprentices are persons bound to a master, to learn some art or trade. They may be bound to learn the trade of husbandry, as well as any other. An apprentice, to be holden, must be bound by deed. It seems that the common law required it; and this is the only contract which the common law required to be in writing. And it is not at all improbable, that this requisite was a provision by some ancient statute, which is now lost. 1 *Bl. Com.*, 226; *Ld. Ray.*, 117; 1 *Salk.*, 68; 2 *Ves.*, 64, 492; 6 *Mod.*, 182. It would seem that a contract for an apprenticeship by parol, so far as it lays any obligation on the contracting parties, is utterly void. It will not amount to a hiring by the year, which may be by parol. 8 *T. Rep.*, 374. That [*342] an apprentice cannot be * bound, unless retained as such in a deed, is ascertained by the doctrine of the books. *Barnes' Notes*, 57. The particular reason of this rule is not

(1) The agitation which the question of slavery has undergone in the United States for the last few years, has been such as to leave scarcely any intelligent mind in ignorance upon the subject. Although serious differences exist as to the most practicable mode of effecting its abolition, still the fact of its unrighteousness is almost universally admitted. Ever since the organization of the federal government, measures have been in operation to provide for its final extinguishment; nor have these measures been without their effect. In the New England States, and New York, it has become wholly extinct, and is on the decline in many of the others. In Pennsylvania, by an act of 1780, its gradual abolition was provided for, and the evil has been finally removed. It still exists in most of the Southern States. Efforts have been made to abolish it there; and the Convention, appointed to recommend alterations in the Constitution of the State of Virginia, in 1830, entertained a project calculated for its final abolition, which, after a protracted and stormy debate was only defeated by an inconsiderable majority.

very apparent; and, indeed, a contrary doctrine is now maintained. 8 T. Rep., 379; 1 East., 533. That a contract of so much importance, as the obligations usually laid upon a master, in educating and instructing an apprentice, should be by deed, is a very reasonable provision; for room is left for controversy, from the uncertainty of parol testimony. (1)

(1) The statutes of the several states on the subject of apprenticeship, do not essentially differ among themselves, nor from the English statute. In Vermont and New York, the provisions are almost identical. Children above the age of fourteen years may be bound as apprentices; males to the age of twenty-one and females to the age of eighteen, or to the time of their marriage within that age. This may be done by their father or other legal guardian, and if they have no parent or guardian, with the consent of the selectmen, in Vermont, and by the overseers of the poor, two justices, or a judge, in New York. In Vermont, the overseers of the poor may bind out the minor children of any person who has become actually chargeable to his town; and in both states, statute provisions also exist to redress the grievances of the apprentice in case he shall have been abused. Rev. Stat., Vt., 1839, c. 66; Rev. Stat., New York, 5th ed., vol. 3, p. 248. In both these states, as in all others whose statutes upon this subject the writer has examined, the apprentice must be bound by deed, and the infant himself must be a party to the indenture, except in the special case of an apprentice who is chargeable as a pauper. This also is the doctrine of the common law. Rev. Stat., Vt., 1839, p. 345; *Rex v. Inhabitants of Cromford*, 8 East's Rep., 25; *King v. Inhabitants of Arnesby*, 3 Barn. & Ald., 584; *Harney v. Owen*, 4 Blackf. Ind. Rep., 388; *Commonwealth v. Van Lear*, 1 Serg. & Rawle, 250; *Supplee's case*, 6 Serg. & Rawle, 340; *Guthrie v. Murphy*, 4 Watts' Rep., 80; *Commonwealth v. Jones*, 3 Serg. & Rawle, 158.

Minors under the age of fourteen may be bound apprentices until that age by their father if living, without their consent; and if not, by their mother or legal guardian; and above that age in the same manner with their consent. R. S., of Maine, ch. 90, sec. 1; *Whitmore v. Whitmore*, 43 Maine, 458.

The father has no authority to bind out his child as an apprentice without his consent, and if the infant does consent and is not a party to the deed, he will not be bound. Rev. Stat., Vt., 1839; New York Rev. Stat., vol. II, p. 160; *Commonwealth v. Moore*, 1 Ashm., 123; *Squire v. Whipple*, 1 Vt. Rep., 69.

A contract of apprenticeship, not conformable to the statute, is voidable only by the apprentice, and cannot be avoided by any other person. *Page v. Marsh*, 36 N. H., 305. And if the infant fulfill the stipulations of such contract, he will be entitled to its benefits accruing to himself. *Ibid*.

A contract made with a minor apprentice to serve beyond full age is invalid. It may, however, be ratified after the infant arrives at full age; but such ratification, it was held, must be express. *Walker v. Chambers*, 5 Harring. (Del.), 311. But it was held, in *Forsyth v. Hastings*, 1 Williams (27 Vt.), 646, that a special contract by an infant to labor is ratified by his continuance in it for a month after

Persons who are bound apprentices, are commonly infants; and such person cannot bind themselves. This is usually done by their parents and guardians; and they are bound that the apprentice perform that which they contract that he shall do. By a statute of Eliz. infants may bind themselves, by indenture of apprenticeship; but it has always been holden, since that statute, that the infant is not bound by the covenants in the indenture; and that the only effect that it has, is to give a right to the master, as long as the relation exists, to his wages, and all the rights of government; and the infant, if he serve out the time prescribed by law, will be entitled to exercise his trade, as much as if he had been bound by his father. The only effect that it can have, is to entitle the master to the wages; for, if the infant had not bound himself, but had lived with his master, learning a trade, this master, *de facto*, would have the power of moderately chastising such servant; and such servant would be entitled to exercise his trade. Cro. Car., 179, 548; Cro. Jac., 497; Mod., 190; 5 T. Rep., 716. (1)

his majority, and cannot be afterwards avoided. Where a minor, indentured as an apprentice, serves his master until it is discovered by the master, before the termination of the apprenticeship, that the indentures are void by reason of their not having been executed by the minor's father; and the apprentice is thereby discharged; the master is not liable, either to him or his father, on any implied promise to pay for the services. *Maltby v. Harwood*, 12 Barb., 473. A father may bind himself that the services of his infant child shall be rendered to another, during the period for which he is entitled to them, and if he agree, as far as is in his power, that such services shall be rendered by the infant, he will be obliged to exercise what paternal authority he possesses to cause the services to be rendered, although the minor is not bound by the articles of indenture without he join in their execution. *Van Dorn v. Young*, 13 Barb., 286. An indenture in accordance with the statute of 1821, ch. 170, concerning apprentices, contains no covenant by which the guardian is personally bound. *Chapman v. Crane*, 20 Maine, 172.

(1) In the matter of *McDowles*, 8 John. Rep., 328; *Pierce v. Messenberg*, 4 Leigh's Rep., 493; *Stringfield v. Heiskell*, 2 Yerger's Tenn. Rep., 546; 1 Whart. Dig. Penn. Rep., 43, and cases there cited. It has been held, in England that an infant may bind himself as an apprentice. In *Rex v. Inhabitants of Wigston*, 3 Barn. & Cress., 484, the court says, "it is a general rule of law, that an infant cannot do any act to bind himself, unless it be manifestly for his benefit. Binding himself as an apprentice has been considered such an act, and therefore it has been held that an infant is competent to make such a contract." See also 2 Kent's Com., 242.

In England, provision is made, by several statutes, for the binding out of poor persons by the overseers of the poor, and justices of peace; and the persons to whom they are bound, are obliged, under a penalty, to take them. This is an inroad upon the rights of the subject very rarely to be found in the English system of jurisprudence. * (1) In Connecticut, we have statutes that enable the selectmen of a town, with the [343] advice of a magistrate, to bind out the children of persons who live idle, and misspend their time, and are liable to come to want; and when the children have grown rude and stubborn: males, until they arrive at the age of twenty-one years, and females until they are eighteen years of age.

Whatever wages an apprentice earns, belong to the master: and if an apprentice should leave the master, and earn wages, and receive them, and lay them out in any article, it would belong to the master: As where, with such money, the apprentice bought a ticket, which drew a prize; this belonged to the master. It is not material that wages were earned without the consent of the master, or that it was earned in any other line of business, than that of his trade; and for such earnings the master may recover. Sho., 582; Co. Lit., 117; Salk., 68; 1 Ves., 488, 83; 6 Mod., 69. (2)

(1) Provisions for binding out the children of poor persons as apprentices, may be found in the statute books of many of the states. Rev. Stat., Vt., 1839, p. 345; 3 R. S., New York, 5th ed., p. 248; Stat., Conn., 1838; North Carolina Act, 1792.

(2) *Lightly v. Clonston*, 1 Taunt., 112; In *Carson v. Watta*, 3 Doug., 350, it was held that prize money, gained by an apprentice on board a letter of marque ship, belonged to the apprentice and not to the master. In this case the court observe, that the master is entitled to all the wages or money fairly acquired by the apprentice, as for labor or service, but not to any extraordinary gains he may acquire out of the usual course of his service. Too much reliance should not be placed on this case, for one strong ground which it was decided, was a custom proved, by which in such case the master was to have the wages and the apprentice the prize money.

In Vermont, it has been decided, that the master may sustain assumpsit for the wages of an absconded apprentice, though the employer did not know of the apprenticeship till after the service was performed. *Conant v. Raymond*, 2 Aik. Rep., 343.

Where a servant is a salvor, the amount of salvage decreed to him belongs to him in his own right, and not to his master. The master has a right to the earnings of

The law has provided several methods, in which an apprentice may be discharged from his master. In Connecticut, by a statute, the county court may discharge an apprentice, when he has been abused by cruel treatment; and the same thing may in England be done in chancery. 1 Atk. He may be discharged by deed. The contract of discharge must be by deed, as the binding is by deed, according to the old maxim, *unumquodque dissolvitur eo ligamine quo ligatur*. But in Connecticut, where an instrument, executed without seal, is of as high a nature as if it had one, I apprehend, that although the indenture should be sealed, it might be discharged by a writing executed by the master, although it was not sealed; and I entertain no doubt that an indenture in writing would be in Connecticut a valid indenture, although not sealed.

[*844] * The apprentice may be discharged by giving up, or destroying the indenture, with intent to release the obligation of the indenture. In Day's Rep., 153, there is a case which countenances the idea, that an apprentice may be discharged by parol. A master who had so done, brought his action for breach of covenant, against the apprentice's father, who had bound the apprentice, and could not recover. If the ground of this decision was, that the master had done wrong in discharging the apprentice, without his father's consent, I apprehend the decision cannot be supported. For this wrong the master was liable. There can be no discharge by parol. The master, notwithstanding this rash act, might have detained him; and if he would not return to service, might have recovered damages. A parol discharge would indeed amount to a license to depart from his service, until he had reclaimed him; and until then he could maintain no action. In England, the quarter sessions, or two justices may discharge, on account of abuses, such apprentices as they bind out: but in Connecticut, our statute reaches all cases; and

his apprentice in the way of his business, or any other business which may be substituted for it; but it is different with regard to his extraordinary earnings, which do not interfere with the profits the master may legitimately derive from his service. *Mason et al. v. The Blaiseau*, 2 Cranch, 240; 1 Cond. Rep., 397.

the county court may discharge any apprentice, when abused by the master or his family. (1)

The right, which the master acquires to the service of his apprentice, can never be assigned to another person. It is incompatible with the nature of the contract, which is altogether fiduciary. The master is one, in whom the parent of the apprentice has such confidence, as induces him to place under his care his child. It is a personal trust which cannot in any case be assigned to another. By the custom of London, apprentices may be assigned. It is also a usual practice in this country; but I have not learnt that such practice has ever been sanctioned by the decision of any court* 1 Bl. Com., 420; 12 Mod., 553; 3 Keb., 519; Doug., 69; Stra., 1267. If the apprentice [*345] serve under such an assignment, he gains the rights and incurs the duties of an apprentice. *Ld. Ray.*, 633. (2)

(1) It was decided in Vermont, that the indenture of apprenticeship became voidable upon the death of the master, or upon an assignment of the apprentice. It is believed that the law upon this point has been altered by the Revised Statutes of 1839. By this statute the minor is absolutely discharged by the death of the master, and the minor may be bound out anew. P. 347. The county court also has power to discharge the apprentice when the master is brought before it, charged with a breach of the covenants contained in the indentures. *Rev. Stat., Vt.*, 1839, p. 347. By the statutes of New York, the general sessions of the peace, or two justices, possess the power of discharging him. 3 R. S., N. Y. (5th ed.), 263. In Pennsylvania, this power is exercised by the court of general sessions, whenever the acts of the master may be deemed injurious to the mind or morals of the apprentice; as for compelling him to labor on the Sabbath. *Commonwealth v. St. Germain*, 1 Brown's Penn. Rep., 74. The indentures may of course be vacated by the consent of all parties. *Graham v. Graham*, 1 Serg. & Rawle, 330. A somewhat anomalous doctrine seems to be held on this subject in Louisiana; but which cannot be said to have no foundation in sense or law. It is that the contract of apprenticeship is personal and not susceptible of alienation, without the consent of all parties concerned, and consequently its operation ceases on the insolvency as well as on the death of the master, inasmuch as his character and disposition entered into the consideration of the contract. *Versailles v. Hall*, 5 Miller's Louis. Rep., 266, cited in note to 2 Kent's Com., 266.

(2) Numerous decisions may now be found sanctioning assignments of indentures of apprenticeship, but it seems to be a vexed question, whether the assignment will be binding upon the apprentice unless he consents to it. The better opinion is that he is not bound. *Commonwealth v. Van Lear*, 1 Serg. & Rawle, 248; *Common-*

The master is not at liberty to send his apprentice abroad, unless such liberty is contained in the contract, or the business to be learned, or the health of the apprentice, require it. If the master die, the executor cannot retain the apprentice. It is a personal trust; it dies with the person; and there is no probability that the executor will be able to instruct the apprentice respecting his trade. The reason why such right should not be transmissible to the executor, is stronger than the reason why it should not be assignable. No more confidence is placed by the parent in the executor, than there is in the master to whom he is assigned; and, in the former case, the apprentice cannot probably be instructed; but, in the latter case, he may. (1) It has been holden, that the executor is bound to instruct the apprentice; and, if he cannot, to procure some person to do it. This is a violation of the principle that an apprentice is not assignable; for, if he be thus bound, he must have a right to assign the

wealth v. Jones, 3 *ibid.*, 158; *Haley v. Taylor*, 3 *Dana's Ken. Rep.*, 222. In Pennsylvania, the enlistment in the army of an apprentice, with the consent of his master, who had been bound by the managers of the almshouse, was held valid, although the master had covenanted not to assign the indenture without the consent of the managers, which consent was not given to the enlistment. *Commonwealth v. Barker*, 5 *Binn.*, 423. The statutes of Massachusetts and New York also authorize such assignments under certain restrictions. *Revised Statutes, Mass.*, 1835: *Rev. Stat. New York*, vol. II, p. 156. In Vermont, an apprentice bound by the overseers of the poor, may be assigned without his consent, and if his master die, he may be retained in the service of the administrator with the consent of the overseer. The doctrine in ordinary cases is that the assignment is not absolutely void, but may be avoided at the pleasure of the infant. *Phelps v. Culver*, 6 *Vt. Rep.*, 430.

Where a person, in good faith, for a valuable consideration, took the assignment of the indentures, and the apprentice assented to the transfer, and served him until he was twenty-one years of age. Held, that the apprentice could not recover for his services. *Williams v. Finch*, 2 *Barb.*, 208. Although an indenture of apprenticeship may not be assignable, nor transferable, yet the assignment, as between the old and new master, would be valid as a covenant for the services of the apprentice; and, if the apprentice continued to serve his new master, there would be no failure of consideration of the assignment. *Nickerson v. Howard*, 19 *John.*, 113; *Guilderland v. Knox*, 5 *Cowen*, 363.

(1) *Rev. Stat., Vt.*, 1839, p. 343; *Stat., Mass.*, 1838; *Versailles v. Hall*, 5 *Miller's La. Rep.*, 266; and see note 1, preceding page.

apprentice. This is not now considered to be law. 1 Sid., 216; 2 Str., 1267; 1 Salk., 66. (1)

It is laid down in the books, and the current of authorities support the proposition, that the executor is bound to provide clothing, diet, &c. So the indenture provides; but it appears to me that such authorities are destitute of principle; and that, by the death of the master, all covenants are forever discharged. This necessarily arises from the apprentice being discharged from any obligation to serve the executor. There is surely something very unreasonable in that law which compels the executor to provide for an apprentice from whom he cannot receive * the least benefit. The reciprocity intended by the original [*346] contract is wholly lost, when the obligations of the apprentice to serve, and the covenant of his parent that he should serve, are discharged by the death of the master. The master's obligation to instruct is also at an end, and never was transmitted to his executor. This renders the contract perfectly reciprocal and equal. 1 Keb., 761, 820; 1 Sid., 216; Cro. Eliz., 558.

In some trades, in some places, it is usual for a master to receive a premium for instructing. It has been decided in chancery that, on the master's death, before the apprentice has learnt his trade, part of such premium shall be restored. And even where it was stipulated by contract how much was to be restored, upon the happening of such an event, chancery has decreed a return of more than the stipulated proportion, when a master has died very soon after an apprentice was bound to him. The principle of such decision I am not able to discover. It seems more like making a contract for the parties, than enforcing their contract. 1 Ves., 560; Pr. in Can., 396; 1 Atk., 149; 2 Ves., 64. (2)

(1) No power is believed to exist, at common law, to compel the master to instruct and educate the apprentice. But the statutes of several of the States have humanely provided, that such a covenant shall be inserted in the indentures on the part of the master. Rev. Stat., Vt., 1839, p. 345; Stat., N. Y., 1788; *ibid.*, Conn., 1838. Such a clause is not found in the English statutes.

(2) The relation of master and apprentice, where it exists under proper restrictions, is one well calculated to advance the interests of the apprentice, and is often attended with a corresponding advantage on the part of the master. In the United

By the English statute, an apprentice gains a settlement in that place where he served his master, the last forty days of his service. We have no such statute. An apprentice cannot, by our law, gain a settlement by commorancy with his master. By a statute of Connecticut, if an apprentice run away from his master, he shall serve him treble the time of his absence.

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*CHAPTER II.

OF MENIAL SERVANTS. OF DAY LABORERS. OF PRINCIPALS AND AGENTS, FACTOR, BROKER, AUCTIONEER AND ATTORNEY.

MENIAL servants are such as dwell in the family, and are employed about the domestic concerns, the garden or farm, upon a contract of living with a master for a certain time; for, if nothing is mentioned, when the contract is entered into, respecting the length of time that the servant should serve, it is, by the English

States, where industry is a peculiar characteristic of the great mass of the population, this relation becomes almost indispensable, for the purpose of training our youth to the exercise of those mechanic arts whose value is every day becoming more duly appreciated. The resistless spirit of progress in every department of art which is found in America, and the inventive genius which yearly pours forth its thousand improvements and discoveries in the world of mechanics; which has reduced the elements themselves to a complete servitude to the wants of man; are, in a great degree, attributable to the wholesome existence of the relation of master and apprentice. Frequent as it is, instances of an abuse of power on the part of the master are rarely to be met with; for the apprentice is generally taken into his family, where, in a few months, while he is indoctrinating him into the mysteries of his art, he is also entwining about his heart the chords of parental affection — a much surer safeguard than legal remedies against the abuse of adventitious authority. If the minor forfeits the covenants in the indenture, the master is not without his remedy. If he is enticed away, the master may have his action against the person enticing him. *St. Clair v. Jones*, Add. Penn. Rep., 343. If the apprentice creates a new relation, as by enlisting in the army, he may still be taken upon a *habeas corpus*, and the court will order him to be delivered to his master. *Commonwealth v. Beck*, 1 Bro. Penn. Rep., 277.

law, a hiring for a year. There is no such rule in practice in Connecticut. Such servants may be retained by parol. If they leave their master, they are liable for damages; yet the master is not entitled to their earnings. By an English statute, such hiring for a year gains a settlement. We have no such statute; and such hiring gains no settlement in Connecticut.

Respecting that class of servants called day laborers, there is nothing peculiar; only that in England, by certain statutes, persons having no visible effects are compellable to labor; and justices of the peace settle their wages; and more must not be given by the master, or taken by the servant; and in case they violate this rule, they are liable to a penalty. (1)

All agents act in character of servants to their principals: they act by virtue of authority derived from them. The principal has no general authority or any personal control over them; as a master, in other cases, has over his servant. Every agent is bound by law to pursue strictly * the order of his principal. If he do not, and any loss ensue, it will fall upon [*348] the agent; but if he do, he is not bound for any casual losses. 4 Bl. Com., 227. Among this class are to be reckoned, first, a factor, who is employed abroad, by his principal, in managing for him mercantile concerns.

When a factor gives more for articles, directed to be purchased, than his instructions warranted, the principal may disclaim the purchase, though he will be holden to the extent of his instructions, if the factor choose. If the factor sell for less, in that case

(1) When one contracts to labor for another, for a specific time, at a given price, and fails to perform on his part, without just cause or a mutual relinquishment of the contract, he cannot recover for any portion of the price agreed upon; as, for example, when one contracted to work for another for six months for fifty dollars, and left off at the expiration of two months, it was held that he could not recover for the time he worked. *Brown v. Kimball*, 12 Vt., 617; *Steamboat Co. v. Wilkins*, 8 id., 54; *Faxton v. Mansfield*, 2 Mass. Rep., 47; *Sentry v. Parks*, 8 Cow., 63; *Jennings v. Camp*, 13 J. R., 94; *Clark v. School District in Pacolet* [probably Pawlet] (Vermont), *Law Reporter*, March, 1857, p. 630.

It was held that, where a party to such contract is prevented from fulfilling, by sickness or other inevitable accident, he may recover for part performance. *Fenton v. Clark*, 11 Vt. Rep., 557.

the principal may recover according to the sum contained in the instructions; and however reasonable the conduct of the factor would have been, if he had had unlimited instructions, yet, when he departed from them, it will be no justification. 1 Ves., 510; but not if he sells articles which are perishable. 2 Mod., 100; Eq. Ca. Abr., 369; 2 Ves., 638; 10 Mod., 144; 2 Str., 78, 82. (1)

(1) One of the first principles of the law of principal and agent is, that the principal is bound by the acts of his agent only so far as he acts within the scope of his authority. *Allen v. Ogden*, 1 Wash. C. C. Rep., 174; *Kerna v. Piper*, 4 Watts Rep., 222; *Chill v. Hornish*, 4 Blackf. Ind. Rep., 456. There is, however, a distinction which should always be borne in mind in the examination of this question. The acts of a general agent, i. e., one who is appointed by a man to do all his business of a particular kind, or at a particular place, will be binding upon his principal so long as he acts within the scope of his general authority, although he may act contrary to his private instructions. Thus, where one delivers property to a merchant, acting as a factor, who proceeds to sell the same, the owner cannot avoid such sale, by showing that he authorized a sale of but part of the articles. *Gibbs v. Linsley*, 13 Vt. Rep., 208. So, if property be intrusted with an agent for sale, any person buying and paying in good faith is protected, though the agent may have exceeded his private instructions. *Cross v. Haskins*, 13 Vt. Rep., 536. But where the agent is appointed for a special purpose, and the principal sees fit to limit his powers, if he goes beyond them the principal will not be bound. *Longworth v. Connell*, 2 Blackf. Ind. Rep., 469; *Allen v. Ogden*, 1 Wash. C. C. Rep., 174; *Andrews v. Kneeland*, 6 Cow. Rep., 324; 18 John. Rep., 363; *Chill v. Hornish*, *supra*.

COMSTOCK, J., in *Mechanics' Bank v. New York and New Haven Railroad*, says: "Underlying this whole subject, there is this fundamental proposition, that a principal is bound only by the authorized acts of the agent."

"This cannot be limited by secret instructions of the principal on the one hand nor can it be enlarged by the unauthorized representations of the agent on the other." In accordance with this principle, where an agent, who had been authorized to draw and indorse notes in the name and for the benefit of his principal, drew various notes which, in appearance, were within this power, but which, in reality, had no connection with the business of the principal, it was held, by the Court of Errors (reversing the opinion of the Supreme Court), that they could not be recovered against the principal. *The North River Bank v. Aymar*, 3 Hill, 261.

The court, in such case, held that the dealer would not be protected by showing the representations of the agent, but that he was bound to inquire and ascertain whether the transaction was, in fact as well as in appearance, within his authority. The Supreme Court held that he could rely upon them.

The master of a ship, who has unquestionable power to sign bills of lading for goods shipped, signed bills of lading, the goods not being actually shipped. The act judging from the appearance (every bill states that the goods are received on

When a factor sells his principal's goods at a less price than his instructions warrant, the purchaser shall hold the goods, and the factor may sue the purchaser in his own name; and this he may do, although the purchaser knew the goods belonged to the principal. Whenever the principal forbids the purchaser to pay to the factor, the purchaser must not pay him; but in that case, the principal has given up his claim against the factor, for not pursuing his instructions. B. N. P., 230; 7 Term Rep., 359; 1 H. Bl., 361. (1)

A factor can never pawn the goods of the principal for a debt of his own, so as to change the property; but the pledger is

board), was within the power; but the principal was not held liable, because it was not so in fact. *Grant v. Norway*, 10 C. B., 665; *Hubbertsey v. Ward*, 8 Ech. R., 330; 18 Eng. L. & Eq. Rep., 551; *Coleman v. Richea*, 29 *ibid.*, 323.

In *Holden v. Durant* (reported in the Monthly Law Reporter for March, 1857, p. 628, in notes of cases in Vermont), the court held that, when one takes the note of the principal, executed by the agent for a matter known by the payee to be without the proper scope of the agent's authority, it will not bind the principal.

But if the agent has authority to execute notes on behalf of the principal, and execute a note to one who is ignorant of any want of authority in the particular case, it will, ordinarily, bind the principal.

And in *Herbert v. Hull*, 1 Ala., 18, if one misuses blank signatures intrusted to him to fill up, using them in a different manner from, and for a larger amount, than his instructions would warrant, it was held that the principal would be responsible to a *bona fide* holder for the full amount.

So, again, where a solicitor purchases or obtains a benefit from a client, a court of equity expects him to be able to show that he has taken no advantage of his professional position; that the client was so dealing with him as to be free from the influence which a solicitor must necessarily possess; and, in case the client is a very young man, the duty is more obvious. *Savery v. King*, 35 Eng. L. & Eq. Rep., 104.

(1) Although it is generally true that, if a factor dispose of goods at a less price than he is instructed, he will not bind his principal, still, if the principal insist on his claim against the purchaser for the price of the goods as purchased, he may hold him to pay it. It has been a question, where the principal directs his agent to pay a certain price for a particular thing, and the agent pays more than he is directed, whether the principal is bound to receive the thing purchased. By the authorities, if the agent offered to pay the excess out of his own pocket, he could compel the principal to take it; otherwise, not. 2 Kent's Com., 618.

When a factor, to whom property is assigned, is directed to sell *upon arrival*, he is bound to follow instructions and sell the property for what it will command, and if he fails to do so he will be liable to the principal for the damage he may sustain

liable to the principal in an action of trover, whenever the goods are demanded of him. It is not material whether the pawnee know, or did not know, that the pawner was a factor; for a factor has no authority to pawn the goods of the principal; his business is *to buy and sell. 1 Str., 1168; 1 Bos. & Pul, [*349] 648; 1 H. Bl., 362. (1) .

by a fall in the market. *Evans v. Root*, 3 Seld. (N. Y.), 186; *Coursier v. Ritter*, 4 Wash. Rep., 549; *Marfield v. Goodhue*, 3 Comst. (N. Y.), 62.

But where goods are sent to a factor without instruction as to the time or terms of sale, he is at liberty to sell at such time and on such terms as he shall deem most conducive to the interests of the principal. *Marfield v. Goodhue*, *supra*.

And where there are specific instructions as to the price, as where, for instance, a manufacturer at Amiens, in France, consigns to commission merchants in New York, goods for sale, invoiced at so much, with instructions accompanying the consignment not to sell less than the invoiced price, adding thereto freight, commissions and other expenses, he has no right to sell below the price named, to cover advances made upon the consignment, without first calling on his principal for repayment.

The damages sustained by such sale will be estimated, in an action in favor of the principal for such wrong act, by ascertaining the amount of injury actually caused to the principal.

Therefore, the factor may show that the goods, at the time of sale, and down to the time of trial, were worth no more than the price for which they were sold.

And the factor sells at his peril, if the goods should rise at any time previous to the bringing of the action, and perhaps the time of trial: though he sold at the then market price, such increased price would constitute the measure of damage. *Blot v. Boiceau*, 3 Comst., 78.

Prima facie, the invoice prices, with the charges and interest, ought to be regarded as the actual value; and, if no other evidence is offered, the plaintiff should recover according to those prices. *Stevens v. Low*, 2 Hill, 132.

In *Frothingham v. Easton*, 12 New Hampshire Rep., 239, 242, cited in the case of 3 Comst., the same rule was established in estimating damages. The plaintiff delivered to the defendant a quantity of wool, with instructions not to sell at less than twenty-four cents the pound. Upon this the defendant made advances. This was in March. Soon after the consignment the price of wool fell, and continued to fall until October, when the defendant sold at fourteen cents, without asking for a repayment of the advances. Chief Justice PARKER delivered the opinion of the court, who held that the measure of damages was the amount of injury sustained by the sale contrary to the orders of the principal, and that, no actual loss appearing to have been sustained by the wrongful act of the factor, the principal was entitled only to nominal damages.

(1) *Guerreiro v. Piele*, 3 Barn. & Ald., 616; 5 John. Ch. Rep., 129. This principle, that the factor shall not pledge the goods of the person for whom he is acting, is

A factor has a lien on all the property of the principal in his hands, and can retain it until the balance of his account is paid. This incumbrance is created by the common law; but if the factor once suffer the goods to go out of his hands, his demand remains a just demand against the principal; but his lien is gone, and he cannot reclaim the property. The factor has no lien upon the goods of the principal until they come into actual possession. A constructive possession will not answer. *Esp.*, 584; 1 *Bur.*, 498; 2 *East.*, 227, 532; 3 *Term Rep.*, 119; 1 *Atk.*, 184; 2 *Ver.*, 117. (1)

Whether a factor can sell on credit, where his commission is general, without mentioning that he may sell on credit, seems to

held to with great strictness. It has even been held, that, where goods are consigned from abroad to a factor, to be sold on account of the consignor, and a bill of lading was sent to deliver to the factor or his assignee, and the factor afterwards indorsed and delivered the bill of lading, together with the goods, to the defendants, who did not know that he was not the owner of the goods, that the defendants could not retain the goods as against the consignor till the payment of their debt. *Martini v. Coles*, 1 *Maule & Sel.*, 140. Essentially the same principle is held in *Shepley v. Kymer*, 1 *Maule & Sel.*, 484. The business of the factor is, in good faith, and in accordance with the instructions of his principal, to dispose of the property consigned. He cannot, therefore, under a pretended sale of the property create a lien on it in favor of a third person against the principal. *Kinder v. Shaw*, 2 *Mass. Rep.*, 398; *Fielding v. Kymer*, 2 *Brod. & Bing.*, 639; *McCombie v. Davis*, 7 *East. Rep.*, 5.

The rule, as stated in the text, that the factor has no right to pawn the property of the principal intrusted to him, and the consequent liability of the pawner to an action of trover in favor of the principal, is sustained by the following cases, in addition to those cited above: *Stevens v. Wilson*, 6 *Hill*, 574; *Story on Agency*, sec. 113, n. 5; and it has been held that the principal, upon settlement with his factor, might abandon the goods and treat the money raised therefrom as money had and received to his own use. *Rowen v. Stewart*, 4 *Mann. & Gran.*, 295.

A request to the factor to make remittances, in anticipation of a sale, will not authorize him to pledge the property. *Querier v. Freeman*, 3 *Barn. & Cress.*, 342; *Dunlap's Paley's Agency*, 215, n.

(1) By virtue of this lien, he may sometimes change the possession of the goods, and, so far as his lien extends, give a security upon it to the person who receives the possession. It is, however, nothing but a continuance of the factor's possession. *McCombie v. Davis*, 7 *East. Rep.*, 5; *Urquhart v. McIver*, 4 *John. Rep.*, 103.

A factor can only claim a lien on property in his possession. *Coward v. The Atlantic Insurance Company*, 1 *Pet.*, 444, 445. (Per *STORY, J.*) If acquired by an

be a point not fully settled. (a) The authorities are contradictory. It is not pretended, that the purchaser on credit cannot hold the goods purchased; but that the factor, in case of insolvency in the purchaser, is liable to his principal. When a factor does not pursue his commission, he not only becomes liable to any loss that may ensue, but loses his factorage. If a merchant receive goods from his factor, and sell them, which goods were bought at a greater price than the factor's instructions warranted, he shall account with his factor for the price which the factor gave; for, by the receipt and selling, he has acceded to what was done by the factor, and waived all challenge against him on that account. 1 Ves., 509. In that case, the principal, on the arrival of the goods so purchased, refused to abide by the contract, but took the goods and sold them, and then contended that he acted in capacity of agent to the factor, and sold them on his account. But the court was of opinion that, by the acts of receiving and selling, he had acceded to the contract, and was [*350] liable to account with * the factor according to the price paid. It is laid down, that, in those cases where the factor has authority to sell on credit, if he sell to an insolvent person he is answerable himself. There is no doubt of the correctness of this opinion, if the factor sold to an insolvent person, knowing him to be such; or if, by using ordinary diligence, he might have known the circumstances of the purchaser. But if the

(a) Malloy, 422; 1 Bula., 12.

illegal act or in bad faith, he has no lien. *Dunlap's Paley on Agency*, 187; *The Bank of Rochester v. Jones*, 4 Comst. (N. Y.), 497.

Where the bill of lading has not been delivered to the consignee, and there is no other evidence of an intention on the part of the consignor to consign the specific property to him, no lien will attach. *Russ. on Factors and Brokers*, 204; *Mitchell v. Ede*, 11 Adol. & Ellis, 888; and this is so although the consignor is indebted to the consignee or factor at the time for advances upon previous consignments to an amount greater than the value of the goods. *The Bank of Rochester v. Jones supra*. It was also held, in support and recognition of the above doctrine, that, where property is delivered to a forwarder or carrier, upon consignment to a factor for sale, but the bill of lading is not delivered or sent by the owner to the factor, and the property has not reached him, the factor acquires, by the transaction, no general or special property in the goods. To the same point is *Allen v. Williams*, 12 Pick., 297.

person trusted was in apparent good circumstances, or in such credit that prudent men trusted to his credit, it would be very unreasonable to subject the factor; for, in such case, there is no want of fidelity to his employer; and in this manner I understand the law to be laid down by Marius, 83. If the factor sell the goods of his principal to A on credit, and then sell to A goods of his own, and receives money, he shall be answerable to his principal, for as much as will satisfy the principal's demand, if he received so much; for he cannot receive his own debt to the prejudice of his employers. (1) If the factor run his principal's goods, or make a false entry, he must be answerable to the principal, if there is loss by forfeiture. It seems that he may charge the duties, as if he had paid them. The principle, if any, is this: that he runs the risk of losing all. The rule is a tempta-

(1) Whether the factor could sell the goods of his principal at all on credit, without the express directions of the principal, has been a matter of serious question. The cases, however, now proceed upon principles among which the following may be considered as well settled: Where nothing is said in the factor's instructions relative to the manner of sale, and it is the usage of the place to dispose of such articles upon credit, he may so sell them, provided he uses due diligence to ascertain the solvency of the purchaser, and does not give a longer term of credit than is usually given in such cases. The usage of trade has a powerful influence in determining the right of the factor thus to sell. He could not bind his principal by agreeing to accept, in payment for the goods, articles of merchandise, when the usual course of trade is to receive money, at the sale, or expiration of the credit. Nor could he bind him by giving a credit upon those articles which are usually sold for cash. *Bingham v. Bache*, cited in 1 Yeates' Rep., 487; *Laussatt v. Lippencott*, 6 Serg. & Rawle, 392; *Goodenow v. Taylor*, 8 Mass. Rep., 36; *Leverick v. Meigs*, 1 Cow. Rep., 645; *Greenly v. Bartlett*, 1 Greenl. Rep., 172. Where a commission merchant is directed to sell for cash, he is accountable to his employer if he deliver the article sold without receiving the pay therefor; and cannot protect himself by showing a custom, existing among commission merchants, to deliver such articles and wait a week or ten days for payment. *Bliss v. Arnold*, 8 Vt. Rep., 252.

Upon a sale of State stocks, by an agent of the State, upon a credit, without any authority, express or implied, from the legislature of the State, to sell upon a credit, the transaction was held to be illegal. *The State of Illinois v. Delafield*, 8 Paige, 527; 8 C., 26 Wend., 192; *Dunlap's Paley on Agency*, 213. This was a proceeding in favor of the State of Illinois against the holder of the bonds for the stock of the State to the amount of \$300,000, under an agreement with the authorized agent of the State to restrain such holder from disposing of the same, and an injunction was granted.

tion to a dishonorable violation of the revenue laws of a foreign country. *Oa. Ch.*, 25, 76. If the factor be directed to insure, and the factor change his employer with it, as if it had been done, he is chargeable as insurer. 2 *Ves.*, 89. The contract of the factor, made in pursuance of his authority, binds the principal. *Malloy*, 428.

A factor is employed to sell goods; he sells, receives the money, and vests it in other goods, which are in his hands, and dies. These are goods of his employer, and cannot be taken for the debts of the factor. But it is said that, if the factor have the [*351] money, it must be looked upon as his estate. The reason given, is, that money has * no ear-mark. I apprehend, that if the purchase-money could be identified in any way, as if it was found in a paper or in a bag, on which it was written, that it was the principal's money, that in that case it would not be considered as belonging to the factor's estate. 1 *Salk.*, 160. (1)

A broker is one who manages the concerns of another, living with him in the same country; and if a broker, or factor, have sold goods of the principal, they have the same lien on the price, as they had on the goods; and may order the purchaser to pay the amount to him, unless the principal had paid to him his just demand, or tendered it. *Cowp.*, 254.

* In the case of an auctioneer, he is not liable to his principal, although he should bid the articles off at a less price than he was directed to strike them off by the owner. By the law of the land, an auctioneer is bound to strike off goods to the highest bidder, after having waited a reasonable time for a higher bid; and not to strike them off, would be a breach of contract, arising from the nature of the transaction. And, surely, to employ a

(1) Whenever the principal can trace his property into the factor's possession, he will undoubtedly be entitled to reclaim it, either in the hands of the factor or his assignees or representatives, unless they should have disposed of it in their representative character, before they received notice of the principal's claim. The case is precisely analogous to that of a banker or other bailee of property who fails; the owner may take the property, subject to the liens of the bailee, provided it be distinguishable from his other property. *Bryson v. Wylie*, 1 *Bos. & Pul.*, 83; *Parke v. Eliason*, 1 *East's Rep.*, 544; *Taylor v. Plummer*, 8 *Macle & Sel.*, 563; *Vail v. Mitchell*, 4 *Wash. C. C. Rep.*, 105.

person to bid higher, for the benefit of the owner, would be a fraud. *Cowp*, 395. The auctioneer may sue, in his own name, for the price of the goods sold; and it would make no difference, if the purchaser knew, at the time of the purchase, that they were the goods of another. (1)

An attorney is one who is appointed to do a thing in the name of another. Attorneys, in courts of law, are officers of the court, and subject to the regulations of those courts in which they pursue the business of their profession, both as it respects their admission to practice, and their subsequent conduct in court; and, at the same time, are the servants of their employers, and answerable to them, when they sustain loss by their neglect or mismanagement. Upon the principles of the common law, an attorney must have a warrant from his principal to appear * in court (2) In practice, this power is seldom [*352]

(1) The holder of a note is responsible for representations made by a broker, in selling it in the usual course of business, in regard to it, though made contrary to his instructions. *Lobdell v. Baker*, 1 Met., 133.

It is now understood that the auctioneer is the agent of both parties, and the entry made by him of the name of a purchaser, and of the sum bid, is a sufficient signing of the memorandum, within the meaning of the statute of frauds, to charge the purchaser. *Trustees of the First Baptist Church of Ithaca v. Bigelow*, 16 Wend., 28. It is not lawful to place goods in the hands of an auctioneer for sale, with directions not to sell unless he can obtain a certain sum; it is an imposition upon fair purchasers. *Wolf v. Layston*, 1 Hall, 146.

The doctrine that the auctioneer may bring the action in his own name, unless the real owner chooses to bring the action in his name (recognized,) and that he may do so, notwithstanding he has received his commissions. *Mintum v. Maine*, 3 Selden, 221.

(2) In Vermont, this is regulated by statute. It is an offense for an attorney to appear in a suit without authority, for which he may be stricken from the roll of attorneys, and is thereafter incapable of practising in any court in the state. *Rev. Stat., Vt.*, 1839, p. 471. In ordinary cases, he will not be required to show his authority before he is permitted to appear in behalf of a suitor. *Critchfield v. Porter*, 3 Ohio Rep., 518; *Pillsbury's Lessee v. Dugan*, 9 *ibid.*, 117.

An attorney who merely issues an execution and communicates to the sheriff the directions of his clients to seize thereon specified property, is not liable as a trespasser, although the seizure was unlawful. *Ford v. Williams*, 3 Kern. (N. Y.), 578; *Davis v. Newkirk*, 5 Denjo, 92.

And when under a parol authority from his client, he executes a bond of indemnity to the officer under seal, it was held that, the attorney was not liable as a

challenged of an attorney, who is a regular practitioner in court. In Connecticut, the declaration of the attorney himself, that his

trespasser, although the instrument was not binding upon the principal as a specialty, *ibid.*, and *Worrall v. Munn*, 1 Seld. (N. Y.), 229.

Contracts between attorneys and their clients are viewed with suspicion, on account of the advantages of the attorney's position, and conveyances between them have been set aside. *Bibb v. Smith*, 1 Dana, 580; *Downing v. Major*, 2 Dana, 228; *Ford v. Harrington*, 16 N. Y. (2 Smith), 285. *Newhouse v. Goodwin*, 17 Barb., 236. When an attorney brings a suit without any authority from the plaintiff, and the defendant obtains a judgment for costs, a court of equity will restrain the enforcing of such judgment by a perpetual injunction, if it be shown that the attorney is poor and unable to respond. *Smyth v. Balch*, 40 N. H., 363. See, also, *American Ins. Co. v. Oakley*, 9 Paige, 496; *Armstrong v. McOmber*, 18 Barb., 387. Where an attorney appears without authority and confesses judgment, the remedy is against him; or in a proper case application may be made to the court to open the judgment. *Cypert v. McClure*, 22 Penn., 195. And where an attorney appears without authority and suffers or confesses a judgment which results in charging an innocent party with a debt he does not owe, and in creating a lien may deprive him of his property against his will, and without his fault, he will not be compelled to seek his remedy against the attorney. But the court will stay proceedings and give the defendant an opportunity to plead to the merits; preserving, in the meantime, the lien of the former judgment. *Ellsworth v. Campbell*, 31 Barb., 134; *Sharp v. Mayor, &c.*, of New York, 31 Barb., 578. An attorney at law has no authority, by virtue of his general employment, to discharge an execution in favor of his client, unless upon payment of its whole amount. *Jewett v. Wadleigh*, 32 Maine, 110. See, also, *Filby v. Miller*, 25 Penn., 264. An attorney who has been employed, professionally, to sustain a title to land, cannot, either before or after the cause is ended, or during the continuance, or after the relation of attorney and client is ended, while the client holds, or after he has conveyed his interest, purchase for himself the opposing or outstanding title; but such a purchase will inure to the client or his vendee. *Henry v. Reiman*, 25 Penn., 354.

An attorney may, by his book and suppletory oath, prove his retainer and his services rendered in court. *Codman v. Coldwell*, 31 Maine, 560. Attorneys are not personally responsible for services in suits by referees. *Judson v. Gray*, 11 N. Y. (1 Kern.), 408. And as to their responsibility generally, see cases there cited. The remarks of counsel, in the course of a trial, are not to be regarded as an admission, by which the rights of his client are to be determined. *McKean v. Gammon*, 33 Maine, 187; *Jewett v. Rives*, 39 Maine, 9. And whatever may be said or written by a party to a judicial proceeding, or by his attorney, solicitor or counsel therein, if pertinent and material to the matter in controversy, is privileged and lays no foundation for a private action or a public prosecution. But if he go beyond this and use slanderous words, he is a slanderer, and may be prosecuted, both civilly and criminally, as such. *Gilbert v. People*, 1 Denio, 41; *Garr v. Selden*, 4 Comst. (N. Y.), 91. The attorney has a right to retain his fees, in a case, out of the money in his hands, in a suit against him by his client. *Balsbaugh v. Fraser*,

principal employed him, has been holden sufficient to warrant his appearance. When an attorney is retained, his authority continues until the end of the cause, unless it is countermanded. 1 Rol., 291. Nor is it in the power of an attorney to refuse to be an attorney in the case, after he has been retained. The authority of the attorney lasts no longer than the time of judg-

19 Penn., 95. An attorney, who instigated the defendant with others to commit a riot, and promised to defend them if they were prosecuted, cannot recover for his services in so doing. *Treat v. Jones*, 28 Conn., 334. Payment to the attorney, by the officer who sells property, on *meane process* before judgment, is payment to the principal, and will protect the officer. *Ducett v. Cunningham*, 39 Maine, 386. An attorney has no authority, by virtue merely of his retainer to prosecute or defend a suit, to release a claim of his client on a third person, for the purpose of making him a witness. *Shores v. Caswell & ora.*, 13 Met., 413.

Held, in *Wallis v. Loubat*, 2 Denio, 607, and in *Merritt v. Lambert*, 10 Paige, 352, that an attorney would not be allowed to contract with his client for a part of the subject matter of the litigation, as a compensation for his services. But to constitute champerty, the attorney prosecuting must carry on the suit at his own expense. It is not sufficient that he receive a certain sum to commence with, and then is to have a certain percentage out of the recovery. *Benedict v. Stuart*, 23 Barb., 420. The Code of Procedure of New York, abrogates all rules and provisions of law restraining an attorney from making an agreement with his client for the mode or measure of his compensation. Code, N. Y., sec. 303; *Rooney v. Second Avenue R. R. Co.*, 18 N. Y. (4 Smith), 373. A proceeding to foreclose a mortgage, by advertisement, is not a suit in any court within the meaning of the act concerning champerty. *Hall v. Bartlett*, 9 Barb., 297. See as to the powers and liabilities of attorneys further, the following cases: *Smith v. Thompson*, 7 B. Mon., 306; *McCoon v. Galbraith*, 29 Penn., 293; *Bunton v. Lyford*, 37 N. H., 512; *Wilcox v. Smith*, 26 Barb., 316.

Where an attorney purchases lands in his own name, the nature and extent of his interest can be questioned only by his client, or those claiming under him. *Lair & ora. v. Hunsicker*, 28 Penn., 115. An attorney, on the application of his client for advice upon the question whether an equitable interest, which the client had in certain lands, could be reached by a creditor, procured from the client an assignment of such equitable interest for a grossly inadequate consideration; the proceedings being recommended by the attorney for the purpose of defrauding the creditor, and he promising to reconvey after arrangement should have been made with the creditor. The attorney procured a conveyance to himself and claimed to hold the land absolutely as against the client: Held, that although the agreement was illegal, and the law would not relieve either party against the other, *when they stood upon an equal footing*, yet the rule prohibiting an attorney from obtaining any advantage in a transaction with his client must prevail, and that the attorney must reconvey the land upon the consideration paid by him being refunded. *Ford v. Harrington*, 16 N. Y. (2 Smith), 285.

ment, except for the purpose of taking out execution within a year. 1 Rol., 292; 1 Inst., 298: also, of acknowledging satisfaction on record; but he cannot release the damages. In Connecticut, it is customary for him to release the damage, he is attorney in the case; and I never heard that any such release was questioned. (1) When an attorney willfully disobeys the rules of the court, and abuses its process for purposes of vexation, or conducts himself with impudence, or unbecoming language towards the court, he is liable to attachment (2) It has been held a contempt of the court, to bring a fictitious action. B. R. Str., 237. To direct a person to be arrested, in sight of the court, who is attending on his case in court, and who the attorney knows is so attending; if such person is arrested, in pursuance of such direction, it is a contempt of the court. Andr., 275; Str., 1094. By a statute of Edw. I., any attorney who commits any deceit in his practice, is liable to be imprisoned for a year and a day; as if he appear, and suffer judgment, without authority, erase a record, &c. Hob.; 9 Cro. Jac., 694. If an attorney plead a fact, which he knows to be false, his conduct is held to be within this statute; or if he undertake to carry on a suit for a sum in gross, or to be paid, if the case be obtained; but if it be lost, not to be paid; this is very dishonorable conduct, and has been held to be a fraud punished by this statute * [2353] Salk., 515; Hob., 117. No action can be maintained

(1) It is now held that the authority of the attorney does not cease with the judgment, but continues to all legal purposes, until the particular matters in suit are finally closed. *Lynch v. The Commonwealth*, 16 Serg. & Rawle, 368; *Corning v. Southland*, 3 Hill, 552; *Lusk v. Hastings*, 1 *ibid.*, 555.

(2) He commits a contempt of court by executing an appeal bond, contrary to its rules. *Wallace v. Scoles*, 6 Ohio Rep., 428.

An appeal bond, executed by an attorney in the name of his client, is not void but merely voidable, and when satisfied by his client is good. *Haydock v. Duncan*, 40 N. H., 45.

When an attorney collects money for his client and converts it to his own use, he may be suspended for mal-practice. *State, ex rel. Kilburn, v. Hand*, 9 Ohio Rep., 42.

And an attorney, prosecuted in assumpsit for not paying over money collected for his client, is liable to imprisonment, such suit being an action for misconduct in a professional employment within the exceptions in the act to abolish imprisonment for debt. *Stage v. Stevens*, 1 Denio, 267.

against an attorney, or for being an attorney, in a case where he knew that there was no cause of action. 1 Mod., 209. An attorney will not be permitted to disclose, as a witness, the secrets of his client, which came to his knowledge, from his client. If an attorney have papers of his client in his hands, which may tend to convict his client of a crime, and is served with a subpoena, with a *duces tecum* to appear before a grand jury, or court, he ought to deliver them up immediately to his client. 3 Bur., 1687. (1) An attorney is not only liable for damages for his mal-practice, and to attachment for contempt; but is liable to be struck off from the roll of attorneys, and rendered incapable of

(1) It was early decided that a counsellor, solicitor or attorney, should not be permitted to divulge any matters which had been communicated to him in professional confidence. The rule is now so far extended, that the attorney or solicitor, when called as a witness, cannot, under any circumstances or in any proceeding, legally reveal them, and this even when the relation of attorney and client has ceased to exist. *Rex v. Withers*, 2 Camp. Rep., 18; *Starkie on Ev.*, p. IV., p. 896. An interpreter between client and attorney stands in the same situation. 4 Term Rep., 756. The privilege is that of the client and not of the counsel, for the court will not suffer counsel to make such disclosures even if he be willing so to do. *Sanford v. Kensington*, 2 Ves., 189. He will not be forced to produce a paper intrusted to him by his client, in order that the grand jury may inspect it on a charge of perjury against such client. *Anon.*, 8 Mass., 370; *State v. Squires*, 1 Tyler's Vt. Rep., 147; *Rex v. Dixon*, 3 Burr., 1687.

An attorney is not bound to produce, or answer any questions concerning the nature or contents of a deed, or other document, intrusted to him professionally, by his client, and the judge has no right to look at the instrument to see if the objection to produce it, or disclose its contents, be well founded or not. *Voland v. Boyer & Simonds*, 76 E. C. L. Rep., 228.

But it was held in *People v. Sheriff of New York*, 29 Barb., 622, that where there was collusion between a client and his attorney to prevent the court from compelling the production of important papers, required as evidence on an important trial, by transferring such papers to one another, to defeat the administration of justice, the act was not entitled to the protection of the court.

The knowledge acquired by an attorney in another transaction between other parties, does not affect a party who subsequently employs him. *Martin v. Jackson*, 27 Penn., 504. Communications to an attorney's clerk were held to be privileged, in *Sibley v. Waffle*, 16 N. Y. (2 Smith), 180. But held otherwise, when the communications were made to, or in presence of, the attorney's son. *Goddard v. Gardner*, 28 Conn., 172. As to communications generally, see the following: *McLellan v. Longfellow*, 32 Maine, 494; *Bank of Utica v. Mersereau*, 3 Barb. Ch., 528; *Williams v. Fitch*, 18 N. Y. (4 Smith), 546; *Miller v. Weeks*, 22 Penn., 89.

practice. An attorney has, in some courts, a lien upon his client's papers in his hands, until his fees be paid. So where a judgment is obtained, he may notify the defendant to pay him, and not his client; and if the defendant should pay to his client, he will be obliged to pay to the attorney his fees. (1) If, however, the defendant have an equitable claim in chancery, for a set-off against this judgment, this lien is subject to such claim. 1 H. Bl., 217; 2 *ibid.*, 587; 8 T. Rep., 571. When an attorney executes an instrument for his principal, he ought to subscribe it with the name of his principal, the attorney writing his name; or he may sign it with his, the attorney's name, as attorney to his principal, mentioning his name. When an attorney does that for which he ought to be struck off the rolls, the court may proceed in a summary way. Co. Lit., 181. If an attorney will not do that which he ought to do, the court will, on motion, compel him to do it; as to deliver to his client his papers, if his fees be paid; and if he refuse to comply, it is a contempt; and he may be committed to prison, until he does comply. 1 Salk., 87.

* The rule in England is, that, if an attorney use con-
[*354] temptuous words in an inferior court, such court may suspend him: which words, if used in the superior courts, would furnish a good ground for an attachment. 1 Vent., 351. In Connecticut, I believe, it has always been understood, that any court, even a justice of the peace, may commit an attorney for contemptuous language to the court.

(1) The attorney has a lien upon the judgment rendered in favor of his client for the amount of his fees and disbursements in the suit, but the lien extends only to the fees and disbursements of the attorney on account of the taxable costs. *Currer v. Boston & Me. R. R. Co.*, 37 N. H., 223; *Baker v. Cook*, 11 Masa., 236; *Stone v. Hyde*, 22 Maine, 318; *Oreighton v. Ingersoll*, 22 Barb., 541; *Hobson v. Watson*, 34 Maine, 20. And if, after notice by the attorney, the defendant pay the amount of the judgment to the plaintiff, he is liable to the attorney for the amount of his bill. *Martin v. Hawks*, 15 John., 405. The Code of New York has not abolished the attorney's lien for costs. *Rooney v. Second Av. R. R. Co.*, 18 N. H. (4 Smith), 368; *Ward v. Syme*, 9 How. Pr. R., 16; *Haight v. Holcomb*, 16 How. Pr. R., 160. And such lien is not measured by the taxable costs, but covers any portion of the damages which may have been stipulated as the compensation for the attorney's services. *Rooney v. Second Av. R. R. Co.*, *supra*.

What a man, as owner of property, can do, he can enable another, by power of attorney, to do for him: As when A, as attorney to B, executed a deed for B, which contains a contract: if a suit be instituted upon such contract, it must be brought against the principal, stating, that he made the contract, according to the maxim, "What a man does by another, he does himself." 1 Leon., 36; 1 Salk., 76.

Corporations must act by attorney. A person acting as attorney, cannot delegate any power to another, to do a thing, which, by the power of attorney, he was enabled to do; unless, by his power of attorney, he can substitute another. 9 Co., 76. (1) When a power is given to sell, such power cannot be executed by attorney. 1 Rol., 330.

It is no objection to an attorney, that such person is an alien, or *femme covert*. (2) Co. Lit., 52. The power of attorney must be strictly pursued. If an authority be given to A and B, to do a certain thing, it cannot be done by one alone. Co. Lit., 112 181. If one should die, it can never be executed by the survivor; or, if one refuse, the case is the same. Co. Lit., 113; And., 145. So, too, if given to three jointly, or separately, this power can be executed by the three, or by one, but not by two. If a power be given to A and B, to sell by advice of C, and C dies, A and B can never sell. Moore, 62, 498. By a statute, if executors have authority to sell, and one dies, * the other may sell. In Connecticut, there is a similar statute. [*355]

An agent cannot bind his principal by deed, unless authorized to do so; and, on this ground, a partner can never bind his

(1) It was declared, in the case of *Osborne v. The United States Bank*, 9 Wheat., 738, that corporations could only appear by attorney, but that the authority of the attorney need not be under seal.

Where the only service of a bill in equity upon the defendant, a corporation, was by the acceptance of service by an attorney, who was requested by the president of the corporation, to make such an acceptance as attorney for the corporation, but the corporation had not authorized the president to accept legal service of process, or to appoint attorneys, and the corporation was accustomed to appoint its attorneys only by a vote of the directors. The service was held illegal. *Bridgeport Savings Bank v. Eldridge*, 28 Conn., 556. A corporation summoned as trustees may disclose by attorney. *Head v. Miller*, 34 Maine, 586.

(2) *Sugden on Powers*, 148; *Barnaby v. Griffin*, 3 Ves., 266; 2 Kent's Com., 150.

companion by deed, without special authority so to do. (1) 4 T. Rep., 313; 7 *ibid.*, 207. When an agent, contracting for the public, makes a contract in his public capacity, he is not personally holden. 1 East, 582; 1 Root, 89. The point was so decided, by the supreme court of the United States, in the case of Mr. Dexter. (2)

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*CHAPTER III.

OF THE MASTER BEING BOUND BY THE ACT OF THE SERVANT. OF
HIS BEING BOUND BY THE TORTIOUS ACTS OF THE SERVANT.
OF HIS BEING BOUND BY THE NEGLIGENT ACTS OF THE
SERVANT.

A MASTER is bound by the acts of his servant, whenever there is an express command of the master, to make a contract, or do an injury; or where the servant does an injury, in the immediate pursuit of his master's business; or where an injury arises to another, through the negligence or want of skill of the servant: the master is liable on such contract, or for such injury. If a master expressly authorize his servant to make a contract, the law considers this contract as the master's: for what a man does by another, he does himself; and, when the master commands his servant to do an injury, and he does it, the master is liable: for he who commands, advises, or abets a trespass, is himself a trespasser. But as it respects the servant, the last case is different from the first: for in that the master alone is liable: but in the last case, the servant is liable, as well as the master. Al-

(1) 2 Kent's Com., 631.

(2) This want of liability on the part of a public agent is strictly confined to contracts made by him on the part of the government. Such agent is always liable for his misfeasance or negligence. *Hall v. Smith*, 2 Bing., 156; *Nicholson v. Newbery*, 16 East's Rep., 384.

though there are some cases which favor the idea that a servant is not liable for a wrong act, when done by order of his master, these cases, I apprehend, are not law. The idea that a command, by a superior, is to be admitted as a justification for an injury, is admissible only in the case of a wife, who does an injury by the command, and in the company of her husband. A servant is bound to perform the lawful commands of his master; but not those which * are unlawful. Such a principle would justify a servant in committing any crime. [*357] Even if the servant be ignorant that he is committing any injury; yet, if the thing done, is an injury, he is liable, though done by the command of the master. *Roll.* 95; 1 *Bl.* 430; 2 *Bul.* 595; 1 *Wils.* 228; *Esp.* 580, 588. (1)

(1) The master is answerable for the act of the servant only where the servant is acting in his business, and not for such fraudulent or tortious acts as he may commit, when not in the master's employ. *Foster v. Essex Bank*, 17 *Mass. Rep.* 508. Where the injury proceeds from the carelessness, negligence, or want of skill of the servant, the master will be liable, on the ground that he is bound to employ careful servants. *Grammar v. Nixon*, *Strange*, 653; *Wright v. Wilcox*, 19 *Wend.* 345; *Sly v. Edgely*, 6 *Esp. N. P. Cas.* 6.

The length which a master may be bound by the contract of his servant, is strictly a portion of the law of principal and agent. The master will be bound so long as the servant acts within the scope of his authority, and no further. *Whitehead v. Tuckett*, 15 *East's Rep.* 400; *Gordon v. Coolidge*, 1 *Sumner's C. C. U. S. Rep.* 537. And the express direction of the master to make the particular contract, need not be proved. The right to make the contract may be shown from the relative situation of the parties, or from the principal's having acquiesced in the assumed agency of the servant. *Hazard v. Treadwell*, 1 *Strange*, 506; *Todd v. Robinson*, 1 *Ryan & Moo.* 217.

No action can be sustained against the master of a servant, for an injury received in the course of the service from the negligence of a fellow servant. *Hays v. Western R. R. Corporation*, 3 *Cush.* 270; *Albro v. Agawam*, 6 *ibid.* 75; *King v. Boston & Worcester R. R. Co.*, 12 *ibid.* 112; *Ryan v. Cumberland Valley R. R. Co.*, 23 *Penn.* 384; *Carle v. Bangor & Pistacaquin Canal & R. R. Co.*, 43 *Maine* 269; *Coon v. Syracuse & Utica R. R. Co.*, 5 *N. Y. (1 Seld.)* 492; *Sherman v. Rochester & Syracuse R. R. Co.*, 17 *N. Y. (3 Smith)* 153. But the injury must have occurred without any fault or misconduct on the part of the principal. See *supra*. The principal is bound to exercise proper care and diligence in the election of agencies and instruments with which he employs his agents. *Keegan v. Western R. R. Co.*, 8 *N. Y. (4 Seld.)* 175; *Noyes v. Smith & Lee*, 28 *Vt.* 59. But in order to recover for an injury in such case, the servant must show, that the master had actual notice

There is a difference betwixt the two cases last supposed. In the first, the servant can have no remedy against the master, to

of the defect in the machinery which caused it. *McMillan v. Saratoga and Washington R. R. Co.*, 20 Barb., 449; see, also, *Ryan v. N. Y. State Printing Telegraph Co.*, 26 Barb., 39. In order to charge a corporation in an action on the case for negligence in the performance of a public work, the law must have imposed a duty or conferred an authority to do such work. Thus, where the officers and agents of a city corporation assumed to build a bridge under the authority of a statute not constitutionally passed for want of a two-thirds vote, and the bridge fell in consequence of the negligent construction thereof, it was held, that the corporation was not liable to an action at the suit of a person injured thereby. Held, also, by *BROWN, J.*, that, if the act had been constitutional, and the corporation thereby authorized to build the bridge, yet it would not be liable to the action of a third person, but only to the owners of the bridge, who in this case were the pier owners; for the corporation acted merely as builder, and as such would be answerable only to the contractor. *Mayor, &c., of Albany v. Cunliff*, 2 Comst. (N. Y.), 165. Where a contractor, engaged in repairing a bridge upon a railroad for the company, employs men to work thereon by the day, they are the servants of the contractor, and there is no privity between them and the railroad corporation; and if a man thus employed receive an injury from a passing train, while at work upon the bridge, he may maintain an action against the railroad company, if there be no negligence on his part. *Young v. N. Y. Central R. R. Co.*, 30 Barb., 229; see, also, *Vanderpool v. Husson*, 28 Barb., 196. Gross negligence in a person injured at a railroad crossing, by a passing train, will defeat his action for damages, notwithstanding the omission of those running the train to ring the bell or sound the whistle as required by law. *Stevens v. Oswego and Syracuse R. R. Co.*, 18 N. Y. (4 Smith), 422. Where a person, employed as a servant, is using the team of his master for his own purposes and benefit, and in the absence of and without any direction from the master, and uses the team so negligently as to cause damage to a third party, the master is not liable for such injury, although he assented to the servant using the team for his own benefit. *Bard v. Wenrich*, 26 Penn., 482. A switch-tender, employed by a railroad corporation on a portion of its track, upon which it permits another company to run trains, is not a servant of the latter; and an engineer of the latter, injured by the negligence of such switch-tender, may maintain an action against the switch-tender's employer. And held, further, that a railroad company was liable in damages for an injury resulting to any person lawfully using its road from its neglect to introduce any improvement in its apparatus, which it knows to have been tested and found material to contribute to safety, and the adoption of which is within its power so as to be reasonably practicable. *Smith v. N. Y. and Harlem R. R. Co.*, 19 N. Y. (5 Smith), 127. Where the defendant, who had obtained from the proper authority an exclusive right and license to run a skiff ferry across a river, permitted another person, called a lessee, to exercise the right, not as defendant's agent or servant or for his benefit, but on his own account, he, the defendant, would not be liable for an injury caused by the negligence of such lessee. *Blackwall v. Wiswall*,

reimburse himself the damages which he sustains by reason of his obedience to his master's commands to commit a trespass;

24 Barb., 355. A railroad company is not liable for the negligence of a contractor's servants. *Clark v. Vermont and Canada R. R. Co.*, 28 Vt., 103; *Pawlet v. R. and W. R. R. Co.*, 28 *ibid.*, 298; *Norton v. Wiswall*, 26 Barb., 618; *Gourdier v. Gormack*, 2 R. D. Smith (N. Y.), 254; *Cincinnati v. Stone*, 5 Ohio (N. S.), 38. A railroad company, in an action against them for damages caused by detention on their route, cannot defend by showing that such detention was the result of the willful act of the conductor. *Weed v. Panama R. R. Co.*, 17 N. Y. (3 Smith), 362. A hired a team, wagon and teamster of B. While used in his service, the harness being out of order, the team ran against his horse and killed it. Held, that the teamster was the servant of B, the bailor, and that B was liable for the damage. *Crocket v. Calvert*, 8 Ind., 127.

In the case of *Kelly v. The Mayor, &c., of New York*, 11 N. Y. (1 Kern.), 432, the court held that, the corporation of the city of New York, which had ordered a street to be graded, and contracted with a person to do the grading, is not liable for damages caused by the negligence of the workmen employed by the contractor in performing the work. The contract between the defendants and John Quinn, the immediate employer of the persons through whose carelessness the injury to the plaintiff was occasioned, contained a clause to the effect that, "The whole work to be done under the direction, and to the satisfaction of the commissioner of repairs and supplies, the superintendent of roads, and the surveyor having charge of the work; and the certificate of the superintendent of roads and the surveyor, to that effect, will be a condition precedent to the acceptance of the work, and payment for the same."

The court held that, this gave to the corporation power to direct as to the results of the work merely; that it gave them no control over the contractor or his workmen, as to the manner of performing it, and had no tendency, therefore, to create the relation of master and servant. It was not considered that, the corporation sustained such a relation in this case, that they could direct the workmen; neither was it such that, they had the power of selection, which was treated as a fundamental principle of the master's responsibility for his servant's acts.

The same conclusion was arrived at in *Peck v. The Mayor, &c., of New York*, 9 N. Y. (5 Seld.), in which contract was a clause requiring the contractor to conform the work to such further directions as might be given by the corporation or its officers. The same doctrine is held in *Blake v. Ferris*, 5 N. Y. (1 Seld.), both of which last mentioned cases are cited in the case of *Kelly v. The Mayor, &c., of New York*, 11 N. Y. (1 Kern.), 432, and approved of, as being decisive of this very principle.

The case of *Blake v. Ferris* (decided in 1851), referred to above, was where persons having a license or grant, to construct a sewer in a public street, engaged another person to construct it, at a stipulated price for the whole work. Having made such contract, it was held that, they were not liable to third persons for an injury resulting from the negligent manner in which the sewer might have been left by the workmen employed in its construction.

It was further held, in this case, that, a clause in the license "that the grantees

yet, in the last case, although he is liable to the person injured, he is entitled to an action against his master for the damages

should cause proper guards and lights to be placed at the excavation, and should be answerable for any damages which might be occasioned to persons, animals or property, in the construction of the sewer," did not relate to strangers, so as to render the grantees liable to such stranger, for the negligence of servants or agents, for whose conduct they would not otherwise be liable.

The court, in this case, proceeded upon the ground that, the relation of master and servant was not made out; that such relation must be shown to exist, between the defendant and the person doing the damage, in order to sustain the action against him — to bring him within the maxim that, *qui facit per alium facit per se*, and the consequential rule of *respondent superior*.

The case of *Lloyd v. The Mayor, Aldermen, &c., of the city of New York* (Selden's R., vol. 1), decided in 1851, also, was where the action was brought against the defendants, for injuries received from the negligence of persons employed by the corporation in the repair of its public sewers.

It was observed, in this case, that, the acts of the corporation, were divisible into two classes, one governmental and public, and the other private. When acting in the former capacity, the corporation was sovereign, when in the latter, an accountable, legal, corporate individual. This distinction is recognized as having been made in *Wilson v. The Mayor, &c., of New York*, 1 Denio, 595; *Bailey v. Same*, 3 Hill R., 531; *Rochester White Lead Co. v. The City of Rochester*, 2 Conat. R., 463. The court held, in this case, that, the acts of those employed by the corporation, were acts of the agents of the city, acting in the exercise of its private powers. "Legislation, or, in other words, the establishing of rules and regulations in respect to cleaning the sewers," say the court, "or keeping them in a state of cleanliness, is one thing, and the act of cleaning them another. The power and duty to perform the latter, is clearly ministerial, and falls under the class of private powers. The principle of *respondent superior*, consequently applies, and the judgment must be affirmed.

Reference is made to this last distinction, for the purpose of showing that, in the case of municipal corporations, their accountability rests, first, upon the nature of the act itself — that is, whether it is an act creating a right, or conferring a power to do some other act, which would be an act of legislation; or an act of the corporation in carrying into effect such right, and the exercise of such power.

When it is of the latter nature, the question of the relationship existing between the corporation and their agent arises. *Hutchinson v. The York, Newcastle and Berwick Railway Company*, 5 Ex., 243; *Wignore v. Jay*, *ibid.*, 254.

In the case of *Sadler v. Hemlock*, 4 Ellis & Blackburn, 272; 2 C. L., 32, it was held that, the defendant, who employed a person to clean out a drain, who was not in his employ before, but was a common laborer selected by the defendant on account of his having dug the drain originally, and who did the work without any assistance, and without further direction from the defendant, would be liable for an injury resulting from the negligent act of the employee, in replacing in an improper

which he suffers. If A, with a forged warrant, should arrest B, and command C, to whom he shows his warrant, to confine B a

manner, and with insufficient materials, a part of the adjoining highway, removed by him while clearing the drain.

The court held that, the person thus employed was not an independent contractor, but the servant of the defendant.

Lord CAMPBELL, C. J., in distinguishing this case from that of *Ellis v. Sheffield Gas Consumers' Company*, E. C. L. R., vol. 75, p. 767, cited by counsel, says: "the act there, could not be done at all without creating a public nuisance. There are two classes of cases: the first, where the act is done directly under the order of the employer, and the order cannot be complied with, without doing what is complained of; the second, where the improper mode of doing what might be right, occasions the mischief."

CRAMPTON, J., in same case, says: "The real question is, whether the defendant and Pearson stood to each other in the relation of master and servant. I think that, here the relation was that of master and servant, not of contractor and contractee. It is only on the ground of a contractor not being a servant, that I can understand the authorities."

The case of *Sadler v. Henlock*, makes no distinction between a day laborer and jobber, as the fact of doing the work by the job, would not, of itself, deprive the contractor of a control over the work. It is, also, intimated by the court, that the fact that, the sub-contractor hired the hands, would make no difference, for the superior might be still held liable for the injury caused by the negligence of a hand hired by a servant.

The case of *Martin v. Tenpaly*, 42 B. Rep., 298 [1848], referred to in the notes to *Peachy v. Rowland*, was to the point that, whether the workmen were employed by the job or daily wages, was not a decisive test of the liability of the master. In that case, the owner of a barge, was held responsible for the negligence of two persons employed by the job, to manage his vessel. They also cite *Witte v. Hayne*, 2 Dowling & Ryland, 33 (1822); *Waastell v. Pooley*, 6 Clark & Finnelly, 910, note (1841).

It appears, also, from the case of *Overton v. Freeman*, E. C. L., vol. 73, that, the team of the principal contractor was used in conveying material to the persons employed in paving, which was held, of itself, an indifferent circumstance.

In the case of *Peachy v. Rowland*, 22 Law J. Rep., N. S.; C. P., 81; E. L. & Eq., 442 [1852], the case of *Overton v. Freeman* was held to have been decided upon the same principle, and therefore, identical. The case of *Peachy v. Rowland*, was where the defendants, who were builders, had erected certain houses, on one of the streets leading out of London, and had to construct a drain from these houses to the main sewer. They contracted with Scott & Rudkin to do the brick-work of the drain, and with Ansell to fill in the earth. The road had been opened in communicating with the main sewer, and the earth afterwards filled in upon the drain above the level of the road, and left without light or signal, when the plaintiff drove his cart against it, and sustained the injury complained of. There was

reasonable time, until he could carry him to prison, C being wholly ignorant of the forgery, but believing that A is acting

evidence that, one of the defendants had been upon the premises four or five days before the accident, at which time the opening was fenced around, part of the drain was covered over, and the earth over that part was heaped up, and in the same situation as where the accident happened; but it appeared that, neither of the defendants had any control over, or anything to do with the way in which the earth was filled in. JERVIS, C. J., ruled at the trial, that, the defendants were not liable, and verdict for the defendants accordingly. Motion for a rule nisi, on the ground of misdirection.

MAULE, J., upon the assumption that, Angell was their servant, remarks: "Was there no other way in which he could perform their orders, but by putting the earth so as to create a nuisance?" * * * "It would be a different question, if it could only have been done in such a way as to involve a criminal act." MAULE, J., then delivered the opinion of the court, JERVIS, C. J., CRESSWELL and WILLIAMS, J., concurring.

It was premised that, this case could not be distinguished from the case of *Overton v. Freeman*, which was decided upon the authority of *Knight v. Fox*, *without great inconvenience*. The case was placed upon the ground that the evidence only showed that, the defendants had only employed Angell to fill in the earth; that he was left to do it as he pleased, and that he did it in such way as to commit a nuisance, and cause the injury to the plaintiff.

The only question, say the court, in the case of *Randleton v. Murray*, was, whether the persons causing the injury, were the defendant's servants, and all the court decided, in that case, was that, there was evidence that they were. "Now here," say the court, "there was a public wrong, and the question is, did the defendants employ Angell to perform the work in the special manner in which he did it? Did they order him to commit a nuisance? The court denied the motion.

The facts in the case of *Sadler v. Henlock*, 4 *Ellis & Blackburn*, Q. B., 512; R. C. L., vol. 82, were, that, the defendant was the occupier of some land adjacent to the highway, and directed a man called Pearson, to cleanse out the drain. Pearson was not in the employ of the defendant, but was a common laborer, who had originally made the drain. It appeared that, defendant's drain had become obstructed, in consequence of which, the water had settled upon his land, and he had been told by the parish surveyor, that, the board of health would require all drains to be cleaned out. Pearson did the work with his own hands, and charged the defendant for the job, which he paid. It did not appear that, the defendant interfered with the work, or saw the way in which it was executed, or gave any specific directions. In cleaning out the drain, Pearson took up the part of the highway through which the drain passed, and after completing the work, he replaced the earth, but imperfectly, and with insufficient materials, in consequence of which it gave way when the plaintiff passed over it on horseback, and the horse, by falling into the hole, was injured.

The counsel for defendant, contended that, Pearson alone was liable, and that the rule of *respondent superior* did not apply. The objection was overruled, with

under a lawful warrant, confines B; the ignorance of C will be no defense against B's action; but, in this case, C can recover

leave to move for a nonsuit, or for entering a verdict for the defendant. The plaintiff had a verdict on all the issues.

The court held CAMPBELL, C. J., COLERIDGE, J., WIGHMAN, J., and CRAMPTON, J., concurring, that, the defendant was liable; that, there was nothing in the facts to show any other relation than that of master and servant. The court say, with respect to the case of *Peachy v. Rowland*, "Our decision is not inconsistent with that and the other cases which have been cited, in which the relation of master and servant did not exist."

In distinguishing the case of *Randleson v. Murray* from *Peachy v. Rowland* MAULE, J., in the last case, said that, the former was not the case of a public wrong; it did not take place in the highway, but (as it appears from the case), upon a wharf.

It does not yet appear to have been settled in the English courts, whether the fact that, the operative committed a public nuisance, is to make a difference in deciding upon the liability of the superior. Though, this is stated by the court, as above mentioned, as a distinguishing difference; yet in the case of *Overton v. Freeman*, above, MAULE, J., expressly says that, if any difference arises in the accountability from that fact, it should be rather to hold the employer than to relieve him.

It will appear from the statement of facts in the two cases, that, the courts find it a very difficult matter to discriminate so as to determine in all cases, the proper person to be holden.

By reference to the American cases referred to, it will appear that, the courts find the same difficulty in applying well established principles relative to master and servant, to the different sub-contractors employed in carrying out contracts for municipal, railroad and other corporations, that are so apparent in the English cases.

In the notes to *Peachy v. Rowland*, 16 Law & Eq., 445, by Edmund H. Bennett and Chauncey Smith, will be found an able review of the American cases upon this subject. The conclusion to which they arrive is that, the question may still be considered an open one: that is, whether the principal or master is liable for the wrongful or negligent acts of the servant while in the performance of the superior's work.

It will be observed that, the point decided in *Peachy v. Rowland*, was that, if A. employs another to do a lawful act, the doing of which, did not necessarily involve the committing a public nuisance, and he in doing it, commit a public nuisance, A. is not responsible.

The principle, as stated by SARGENT, J., in *Gray v. The Portland Bank*, 3 Mass., 385 [1807], "that principals and masters should be responsible *civiliter* for the misconduct, negligence and defaults of their agents and servants, while under the authority delegated to them, is indispensable to the security of the rights and property of all who may be affected by said misconduct, negligence or default," was sustained by *Yates v. Bowen*, 8 Pick., 23 [1828]; *Stone v. Codman*, 15 Pick., 297, is based upon the same principle.

The case of *Lowell v. Lowell and Boston Railroad Company* (23 Pick., [also re

from A all the damages which he has sustained on that occasion.

ferred to by them as a noticeable case,) was one where the company had let out the work to a contractor, who was to employ workmen and do the work. It was objected that, they ought not to be held accountable, as the work had been let out, and the injury complained of resulted from the negligence of the workmen employed by the persons to whom the work had been let out; but the court held that, as "the work was done for their benefit, under their authority and by their direction," they were accountable. This case, and the 10 Iredell, which was one where the person employed by A, to move his house, under a contract for a stipulated sum, negligently left a hole open in the street, whereby an injury resulted, appear to ignore the distinction between an independent sub-contractor and a servant, and to fall back upon the doctrine of Bush v. Steinman, referred to above, "whether he worked by agents, by servants or contractors, still it was his work." The language of the court in Lowell v. Lowell and Boston Railroad Company, being very similar.

The language of the court, in the above case, would not appear to have been used with reference to the particular right given to them, in defining this relation. It was upon the supposition that, it was for the "benefit" of the principals that, the unqualified rule of *respondent superior* was based, extending from the lowest operative to the ultimate superior irrespective of the nature of the contract of employment, whereas, the other portion of the language used by the court, in giving their reason for holding the superiors accountable, "under their authority and by their direction," when applied to express the immediate relation existing between the principal contractor and the laborer, are terms held to express the relation of master and servant, in the sense of superiority and subserviency, implying the right to direct and control. It is apparent that, the work might have been done for their benefit without being under their authority (that is to direct), or being under their control.

If the court intended to have it understood that, the work was, *in fact*, done under their authority and by their control, it is consistent with the later decisions, based upon the distinction between sub-contractor and servant; but if they only use them with reference to the authority and control which the company had at the time, of letting out the job, and in the sense of looking after the faithful performance of the contract which the company had made, the case virtually ignores the latter named distinction, and sustains the doctrine of Bush v. Steinman.

The cases all turn upon the nature of the contract between the superior and inferior. If the sub-contractor is independent of the direction and control of the superior contractor, in the prosecution of the work, he is not his servant, it would appear; otherwise he would be so considered.

In connection with the foregoing question of negligence on the part of the servant, the consideration of the question of the master's liability in a suit in favor of one servant, for injuries resulting from the negligence of another and fellow-servant, arises.

In the case of Farwell v. Boston and Worcester Railroad, 4 Met., 49, it appeared that, the railroad company had in their employ, a switchman, who was careful and

Whenever a master permits a servant, in the course of his business, to do an injury, he is considered as having ordered it to be done. It is a maxim, that when a master has power to forbid the doing of an injury, knowing that it is about to be done, and does not, he commands it to be done; and whatever is done by the servant, within the scope of the general authority given, is certainly done by the master. If the master should send his servant to drive his neighbor's cattle off his land, and the servant, so employed, should beat the cattle with improper instruments, so that an injury should be done in consequence thereof, the master would be liable. The master's liability has never been questioned, when a servant does an act injurious to another, through negligence, or * want of skill, on the principle which the law requires, that the master should, at his peril, employ servants who are skillful and careful. 6 T. R., 125; 2 H. Bl., 442; 1 Salk., 441; 5 T. R., 648; 1 Bur., 562.

Until some late determination, it has been always understood to be law, that when a servant, in the immediate performance of his master's business, should commit a willful injury, without any authority from the master, that the master was liable; it being supposed more reasonable, that, when one of two innocent persons should suffer, that he should be the person who put it into the power of the servant to do the injury, by employing him, and putting confidence in him, than one who never placed

trust in his general character, and while thus in the company's employ, and after he had been long in their service, they employed a certain engineer to run a passenger train of cars on their road, who knew the character and employment of the switchman. In a suit in favor of the engineer against the company, for damages caused by the carelessness of the switchman in tending the switches, it was held that, they were not liable.

The court placed the case upon the ground that, having used due diligence in the selection of their servant, and furnished him with suitable means for performing the services for which he was employed, the company would not be liable for an injury received by a fellow-servant, while both are employed in the service of the company in their respective places.

This doctrine is sustained by *Sherman v. R. & S. Railroad Co.*, 15 Barb., 574; *Walker v. Bolling*, 22 Ala., 294; *Cook v. Parham*, 24 Ala., 21. In all these cases, several courts decline to put the case upon the ground of *respondent superior*, and negative the idea of an implied contract on the part of the master to indemnify.

any confidence in him ; and that a man, at his peril, employs a servant that shall do his business in such a manner as not to injure another ; and that the reason is as strong, that a master should run the risk of the unruly passions of his servant, whilst performing his business, as that he should risk his want of care. It was never contended, that a master was answerable for all the torts of his servant. Those which he committed, when he had left his master's service, he alone was answerable for. This subject may be illustrated by the following cases : A, the servant of B, is employed by him to drive his wagon. A, whilst driving his wagon, leaves it in the road, and commits a battery upon C. B would not be liable. But if A had continued driving the wagon, and drove it with violence over C, with design to injure C, B would have been liable. In the first place, A had abandoned his master's business : in the latter case, he was in the immediate pursuit of it, though done in such a manner as to injure another person : or, in other words, in the first case, he was not driving his master's wagon, which he was employed to do ; in the last, he was. By some late decisions, the master [*359] would not be liable in the latter * case. It seems the court did not intend to impeach the principle before laid down, that the master was liable for the injuries committed in the immediate pursuit of his master's business ; but that driving the wagon by A over C, would be, by them, considered abandoning his master's service. Why may it not be said, with equal propriety, that if an undersheriff should commit a tort in the execution of his office, that the sheriff ought not to be liable ; and it was an abandonment of his master's service, the moment that he committed a tort ; and yet there is no point better settled, than that the sheriff is liable in such case ; and I can see no difference, in point of principle, betwixt this case and the one above stated. Indeed, I can see no more reason why the master should be liable for damages occasioned by the negligence of his servant, than for his violence whilst pursuing his business. It was true, that, in some cases, when injury, by neglect, arises in the course of business, in which the master is employed, there may be a difference ; for, in such cases, there is an implied contract, by the master with his employer, that the work shall be skillfully done.

If, therefore, the apprentice of a blacksmith should, in shoeing a horse, injure the horse, the blacksmith would be liable to the owner, upon the implied contract. But, in many cases of injuries by negligence, there is no other implied contract, than that general one with all mankind, that they shall not suffer by the negligence of those whom he employs; and this general implied contract may exist in case of torts by violence, that his servants, in pursuit of his business, shall commit no tort. On what ground is the sheriff liable for the torts of the undersheriff? Here is no implied contract with any particular person; and yet he is liable. The decision in 1 East, 106, is, I apprehend, in opposition to all former received opinions on this subject. What would be the decision, if the action * had been brought against the master, not for an apprentice having negligently lamed [*360] the horse, whilst employed in shoeing him; but, whilst so employed, for having willfully drove a nail into the horse's hoof, with a view to lame him? Might it not be said, that the master is not liable? for here was a total abandonment of his master's business, the moment that the apprentice drove the nail, with a view to lame the horse, as much as where the servant drove the wagon, with a view to injure C? The abandonment of the master's business, is as complete in one case as it is in the other; and if that is the reason of no liability in the master, he can no more be liable in the one case than in the other; and yet I believe it will not be thought that the master is not liable, when the apprentice drove the nail, with a view to lame the horse. I admit there is a difference on another ground, viz., the implied contract of the master, with the person injured, that his horse should not be injured. But nothing can be more apparent, than that this was never deemed the only ground on which the master was liable; for if it had been, the action would have always been founded on this implied contract: whereas it frequently is not. As late as the report in 6 Term Rep., 125, no such idea as that established in East seems to have been conceived. That was an action on the case against the master, because his servant willfully drove his carriage against another's, and broke it. This action the court did not sustain; and their reason was, that, being an immediate injury, it ought to have been trespass. There

was no objection in their minds, that it was brought against the wrong person. No doubt appears to have occupied the mind of the court on this ground. Afterwards, an action of trespass was brought against the master, in common pleas, for negligently driving the cart by the servant, reported in 2 Bl., 442, and the [*361] court would not sustain the action; and * the reason was that it ought to have been case, and not trespass. There was no intimation from the court, nor was the idea conceived, that the master was not liable. The determinations in the two courts, are perfectly reconcilable with each other. In B. R. it was case; and the facts were stated to have been *willfully* done; therefore, the court thought trespass was the proper action. In the common pleas, the action was trespass; and stated to have been *negligently* done. The court was of opinion, that the action ought to have been case. Afterwards, an action of trespass was brought in B. R. for willfully doing these facts; and the court now held, for the first time, that no action could be maintained against the master; and that upon the ground that the act which was done, was a willful abandonment of his master's business. This principle, I apprehend, may have a very dangerous operation; for, surely, the apprentice who drove the nail, in the case put, as much abandoned his master's service: and I do not see that a resort to the implied contract of the master, will alter the case; for, surely, the master may say, with propriety, "My contract can extend no further than to injuries done by my servant, whilst in pursuit of my business; and I am not answerable for what he does, when he abandons that business." The principle adopted in the case in East, shows, that when a servant does an injury with violence, the very doing of it is an abandonment of his master's service. It is said, that there is a difficulty in framing a proper action, to remedy the injury, if one exists; for, that the injury was immediate; and, therefore, trespass, *vi et armis*, was the proper action, if any; and that this action proceeds upon the ground of criminality, which would subject the master to a fine. Certain it is, that the master is not liable, *criminaliter*. It [*362] does not follow, because the injury by * the servant was an immediate injury, that the action against the master must be trespass. It proves, indeed, if the action had been

brought against the servant, it must have been trespass. (1) The same difficulty will occur in the case put, against the sheriff, for the torts of the undersheriffs. I take it that when an immediate injury, with force, is done by another, for whom his employer is

(1) The principle decided in *M'Manus v. Crickett*, 1 East's Rep., 106, has been adopted in several of the United States; and, upon examination, it is believed that it will not be found to militate against any principle of the common law. It was early held, that, in order to make the master liable for the tortious act of the servant, the act must be shown to have been committed by the servant while in the service of his master, and no case of authority is to be found militating against this principle. If, therefore, the fact is established, that the servant, in committing the willful injury, stepped out of the service of the master, upon what principle is the master to be held liable? The question decided in *M'Manus v. Crickett*, was, at the time of its decision, one of great doubt and uncertainty. The court,—perhaps as able a one as ever sat upon the king's bench,—after a lengthy discussion, and taking time to consider of their judgment, came to the conclusion that the master was not liable in trespass for the servant's willful act in driving his master's carriage against another, without the direction or consent of the master. The court considered "that when a servant quits sight of the object for which he is employed, and, without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and his master will not be answerable for such act." The servant was said to have gained a special property at the time in the carriage, by driving it against the plaintiff's chaise, without his master's assent. It is certain that this case was not intended to overthrow those in which the master had been held liable for the mischief arising from the negligence or unskillfulness of a servant, who had no purpose but the execution of his master's orders; for the court expressly say, "that the form of those actions shows that this action of trespass cannot be sustained; for if it can be supported, it must be upon the ground that in trespass all are principals; but the form of these actions shows that where the servant is, in point of law, a trespasser, the master is not chargeable as such, though liable to make a compensation for the damage consequential from his employing an unskillful or negligent servant."

It is believed that the distinction in this case was more as to the *form* of action than the master's liability, for the cases show that in those instances where trespass would lie against the servant, even when acting strictly in the employ of his master, case alone will lie against the master. The case in the 1st of East has since received the sanction of the supreme court of Massachusetts, in *Foster v. Essex Bank*, 17 Mass., 510, and of New York in *Wright v. Wilcox*, 19 Wend., 343, on the ground that there was no authority from the master, express or implied; and that the servant in that act, was not in the employment of his master. In *Chandler v. Boughton*, 1 Crompton and Meeson, 29, it was determined, that when the master was sitting by the side of the servant who drives, and the horse injures the chaise of another, trespass lies against the master, as being his act. See, also, *Bradley v. Giles*, 1 Moody and Robinson, 494; *Lyons v. Martin*, 8 Adol. and Ellis, 512.

liable, the action is trespass on the case; and in perfect analogy is this case with that when a man keeps a dog accustomed to bite, and on that account is liable. It is an action of trespass on the case, although the injury is with force, and as immediate as if done by a man. I apprehend, that the action on the case reported in 6 T. Rep., 125, was the proper action, in which to try the liability of the master. See Cowp., that the sheriff himself is liable for the torts of the undersheriff. (1) 2 Bl. R., 832; Cowp., 406; Esp., 603; 2 T. Rep., 154; Cro. Eliz., 349.

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*CHAPTER IV.

WHETHER A POSTMASTER IS LIABLE FOR THE FAULT OF HIS DEPUTIES. WHEN A SERVANT IS ROBBED OF HIS MASTER'S PROPERTY, TO WHOM DOES THE RIGHT OF ACTION BELONG? OF THE LIABILITY OF INNKEEPERS AND COMMON CARRIERS.

A POSTMASTER is not liable for the defaults of his deputies. This is so decided, as reported in Ld. Raym., 646; Carth., 487; against the opinion of Lord HOLT. It was a decision much complained of by many gentlemen of the profession and the elementary writers. The opinion of Lord HOLT gave weight to these complaints. This point came before the court again, after a lapse of many years, and was decided as before. The case was reported in Cowp., 754. This decision has put this *questio vexata* at rest; and, I apprehend, upon the soundest principles of law and policy. The postmaster's contract is only with the public; and from the public he receives his salary: he has no contract with individuals. Policy requires that such should be the decisions as they have been; for no man, if he were liable for the default of his deputies, would venture to undertake the employment, so enormous

(1) The liability of the sheriffs for the acts of their deputies is regulated by statutes of different states.

would be the responsibility. He is but an intermediate servant; and when that is the case, and an injury arises by a subordinate servant, the intermediate servant is not liable. (1) Each person employed is liable for his own default or misconduct. 3 Wils., 443; Esp., 623; Bl. Rep., 906. If the master's property be obtained from the servant by fraud, the master may sue and recover. So, too, if gained by gambling, the master may recover it* back again. If a servant be robbed of his master's property, in the defense of the master, the master or ser- [*364] vant may bring the action against the hundred; not because the servant is answerable, for he is not, if he conducted fairly; but because he was in possession; and this is sufficient to maintain an action against all persons, except the master; and if the servant could not maintain an action in such a case, the property might be lost. 1 Salk., 613; Cro. Jac., 265; 3 Mod., 289; 4 ibid., 308; 12 ibid., 54. When the servant, who has had the goods of his master taken from him, sues to recover for this injury, he sues on his own possession, and states the goods to be his own; for this is strictly true against all the world, except his master. 1 Salk., 316; Carth., 145. If the master were in company with the servant when the goods were taken from the servant, the servant has no right of action; for, in that case, in the view of the law, the goods are not considered as being in the possession

(1) A postmaster is not liable for the malfeasance or embezzlement of his clerks or deputies; and it seems that he is not even liable for their negligence. He is a public officer or agent of the government; and, as such, the rule of *respondet superior* does not apply. *Wiggins v. Hathaway*, 6 Barb., 632.

It is said, in *Dunlap v. Monroe*, 8 Cranch, 242; 2 Cond. Rep., 484; that the distinction between the relation of postmaster to his sworn assistant has long been settled: he is only liable for the default or neglect of the assistant when he can be liable in an action upon the case itself, charging him with neglect in superintending the discharge of their duties in his office. The language of the court, in 3 Wils., 451, 454, is, "that the deputy postmasters are subsisting substantial officers, and answerable for their own misfeasances and nonfeasances." They have original offices under the Postmaster-General. This distinction was made in the case of *Adsit v. Brady*, 4 Hill, 639; and *Bradley v. Case*, 3 Mann. & Gran., 221. They held that, though nominally the servant of another, yet, if the person held a distinct office, he would be liable for negligence in his office, the same as though he were a principal to all intents.

of the servant, but of the master. 1 Hawk., 148. It is not necessary, in order to entitle the master to an action, that the master's property should be taken by trespass from the servant: he will be entitled to an action, if obtained from his servant by fraud. (1)

Innkeepers, and common carriers, are liable for the misconduct of their servants, when others are not. If the servants of an innkeeper should steal the goods of his guest, the master is liable; and the case is the same, if the servants of the common carrier embezzle the goods that are intrusted to their master. This is a doctrine founded in policy; for, in these cases, guests, and those who employ common carriers, are under the necessity of trusting them with their property, without reposing any special confidence in them; for they are generally strangers to them; and the nature of the business of innkeepers and common carriers, is such, as gives them * great opportunity for collusion with their servants, in robbing their employers. To prevent this mischief, they are made liable for the fault of their servants; and, in such cases, when the master of other servants would not be liable. 1 Bl., 480, 860; Dyer, 266. If the servant of an innkeeper be guilty of misconduct, by the innkeeper's direction, it is said, that the servant is not liable. (2) Such a decision is opposed to every principle of morality and law: it would be subversive of every salutary regulation in society, to admit the idea, that those who are employed by others, may commit injuries with impunity. Such servant is not only liable, *civili-ter*, for such conduct; but *criminaliter*, also. 1 Rol., 95; 2 Bur., 595. On the same ground may be placed the case in which it was determined, that an attorney, who brought forward and

(1) Bac. Abr., tit. Inns, C.

(2) 2 Kent's Com., 593; Cayle's cases, 8 Co., 32; Cross v. Andrews, Cro. Eliz., 622; Richmond v. Smith, 8 Barn. and Cress., 9. In this latter case, the court remark that the liability of an innkeeper very closely resembles that of a carrier. He is, *prima facie*, liable for any loss not occasioned by the act of God, or the king's enemies; although he may be exonerated where the guest chooses to have the goods under his own care. It is upon the ground that innkeepers are bound to provide careful and honest servants, that the necessity of showing negligence in the innkeeper himself is dispensed with. 2 Kent's Com., 594. The common carrier is equally liable for the acts of his servants as for his own, and is answerable for the

patronized a suit on a forged bond, knowing it to be forged, was not liable. In that case, the court observed, that it was only in the way of his calling. This decision is opposed to every legal principle, and highly dishonorable to a profession, in which it is of public importance that the greatest confidence should be placed. A servant is not justified in doing any other act, by the command of his master, than a lawful act. 1 Wils., 328; 3 Bur., 563; Esp.,

slightest neglect, either in himself or his servants. *Cavanaugh v. Such*, 1 Price's Excheq. Rep., 328; *Ellis v. Turner*, 8 Term Rep., 531; *Aston v. Haven*, 2 Esp. N. P. Rep., 533; *Stokes v. Saltonstall*, 13 Peters' U. S. Rep., 181.

Personal notice to a guest at an inn, that a safe is provided for keeping money, jewels, &c., and that the innkeeper will not be liable for their loss, unless given to him for deposit therein, is equivalent to the posting in the guests' room of a written or printed notice under the statute. (Laws of 1855, p. 421.) And, independent of the statute, the leaving by the guest of \$2,000 in gold coin in his trunk in a room, with no person therein in a hotel in the city of New York, after such actual notice, is such negligence as to discharge the innkeeper from any liability. *Purvis v. Coleman and Stetson*, 21 N. Y. (7 Smith), 111. In this case all the justices concurred that the plaintiff's negligence discharged the defendants independent of the statute; but *COMSTOCK, CH. J.*, and *CLARK and WELLES, Js.*, did not agree that a verbal notice could be substituted for the posting of a written or printed one as required by the statute. Purchasing liquor at an inn is sufficient to substitute the purchaser a guest. And where a person went to an inn and treated his friends, and then went away leaving his overcoat, which was taken away, the innkeeper was held liable. *McDonald v. Edgerton*, 5 Barb., 560; *Bennett v. Mellor*, 5 Term R., 273. To make an innkeeper liable, it is not necessary that the goods be delivered into his special keeping, nor to prove negligence. *Glute v. Wiggins*, 14 John., 175, *et supra*. If the guest leave his wagon and goods in an unclosed shed near the inn, being the place designated by the servant of the innkeeper, the latter is responsible for their safety. *Piper v. Manny*, 21 Wend., 282. But an innkeeper is not liable in his character as such, if sheep be put to pasture under the direction of the guest, and they are injured by eating poisonous plants, unless the innkeeper be chargeable with negligence or want of care in the premises. He is not acting, in such case, in the character of innkeeper, to which the strict rules of law are applicable. *Hawley v. Smith*, 25 Wend., 642, and cases. If a guest's trunk be lost or broken open, he is competent, in his action against the innkeeper, to prove the contents and value, in respect only to the articles which may be considered as his personal baggage, including a reasonable sum for traveling expenses. *Taylor v. Monnot*, 4 Duer (N. Y. Superior Court), 116. Where, as accessory to his business, an innkeeper is in the habit of receiving small packages for his guests, he is liable for them as innkeeper, and where the package contains goods of a firm, one of whom alone is his guest, all the partners should bring the action against him for their loss. *Needles v. Howard*, 1 E. D. Smith (N. Y. Superior Court), 54.

580, 588. It has been determined, in a case reported in *Boa* and *Pul.*, 404, that, if a servant employs another servant to do a piece of business, and, in doing it, the servant so employed, is guilty of an injury, that the master is liable. This decision is not in accordance with the opinions of many gentlemen of the profession. It seems to me that every case of this kind must depend on the particular circumstances attending the case. If the master had given authority to his servant to employ other servants, in that case, surely, the master ought to be liable; for [*866] the second servant was as much his servant as * the first; and, in that case, the intermediate servant would be liable. (1)

So, too, if the nature of the business be such, that it was impossible to be performed without the agency of other persons besides the servant, the master would be liable; for it is fairly inferred, that, in such case, there was an implied authority given to the servant to employ them. But if the business was such, that it might be performed by the servant employed, and no authority given to the servant to employ another person, the master ought not to be liable; but the intermediate servant would be: for the injury, so committed, would be done, not by his master's agent, but by his own.

(1) The case of *Bush v. Steinman*, 1 *Boa* and *Pul.*, 404, is the leading case upon this point. The same principle was held in a later case, *Randleson v. Murray*, 8 *Adolph.* and *Ellis*, 109. A somewhat singular case, involving a principle analogous to the one laid down in the text, was presented by the case of *Langher v. Parrier*, 5 *Barn.* and *Cress.*, 547. In this case, the question was whether the owner of a carriage was liable for an injury to the horse of a third person, by the negligent driving of the carriage, where the owner had hired a pair of horses of a stable keeper to draw it for a day, and the owner of the horses had provided the driver. The court were equally divided in opinion.

*CHAPTER V.

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OF THE MASTER'S LIABILITY ON CONTRACTS MADE BY THE SERVANT. OF HIS LIABILITY ON CONTRACTS MADE BY ONE WHO HAS BEEN HIS SERVANT IN SOME CASES, WHERE THE RELATION OF MASTER AND SERVANT WAS AT AN END. OF HIS LIABILITY ON THE SERVANT'S WARRANTY. OF THE SERVANT'S LIABILITY IN CASES WHERE THE SERVANT WAS CONTRACTING FOR HIS MASTER.

THE master is liable on the contract of his servant, whenever he has given an express authority to contract; and when, from the nature of the transaction, there appears to be an implied authority, and, in other cases, where there has been no authority, expressed or implied, the master is bound, upon the ground, it is said, that there has been an assent to the transaction subsequent to the servant's contract. The true ground of his liability is not any subsequent assent; for, whether there has been or not, nay, if there be the most decisive proof of dissent, which removes all presumption of assent, yet the master may be liable on the contract of the servant, because the facts are such that justice dictates that the master ought to fulfill the contract of his servant; and the law, therefore, raises the promise, and compels him, against his will, to fulfill the contract of his servant. When a man has an express authority to contract for another, it is the contract of the employer, and extends to all contracts that are within the scope of his employments. If A employs B as a factor abroad, or as a broker at home, to manage his concerns, he is bound by all the contracts * of B that are within the scope of such business. If A employs B to purchase horses or cattle [*368] for him, he is bound by B's contract for such horses, &c.: if he employs him to purchase them of C, D and E, he is bound only for the purchase of them, for this is the extent of the authority of the purchaser: if it be to purchase a particular horse, A will not be bound if B purchase any other. So, too, the merchant is bound by the contract of his clerk whom he employs in his shop; and there is not any necessity to show that there was any

express authority; it is implied from his employment; but he would not be bound by every contract of his clerk; it must be such as is within the scope of his employment, as selling goods, contracting for produce of the country, and the like; the price agreed upon, and mode of payment; but if the clerk should contract to purchase land, the merchant is not bound, it not being within the scope of his employment. This implied authority is often inferred from the practice of the master. If his servant be sent to purchase on trust, he is bound by such contracts as the servant makes in the purchase of articles on credit. If his practice be to send the money, he is not bound by his servant's contract on credit. If he commonly sends his servant to C to purchase on credit, but sends money to others, he will, in such case, be bound only by the contract with C. If it be his practice to send his servant out to people in general; to purchase on credit, he will be bound by all his purchases on credit, for such things as it is usual for him to purchase; and although the connection between the master and servant is dissolved, yet the master will still be bound for such purchases, until their dissolution has been notified, or become a matter of notoriety, or where a reasonable time has elapsed, so that general notice is fairly presumed. (1)

(1) There seems to be a distinction between the power of a servant to bind his master by contract and an agent to bind his principal. We have already seen that where an agent acts under special powers he must strictly follow them, or the principal will not be bound; while one who is intrusted with general powers has all those implied ones within the scope of his authority. The power of a servant in ordinary cases is most analogous to that of a general agent. Whenever it can be shown that the master has been in the habit of intrusting a particular kind of business to the servant, he will be bound by the servant's contracts in relation to it. He will not be bound unless express authority is shown, or facts and circumstances from which it can be reasonably implied. 2 Kent's Com., 289; Inst., 3, 27, 8. Where the servant is once authorized to pledge his master's credit, the latter is liable, although he afterwards furnish money to the servant to settle the demand, which he omits to do. *Bolton v. Hillieraden*, 1 Ld. Raym., 225; Chit., Jr., on Bills, 197, 198. A discharge without payment from an agent, clothed with full powers to settle as he shall deem for the interest of the principal, is binding upon him. *Middlebury College v. Adm'r of Loomis*, 1 Vt. Rep., 189. A clerk in a country store has power, in the absence of his employer, to receive payment on demands left in his care, and to commence actions thereon, when necessary for their security, and his proceedings legally taken are binding on his employers. *Davis v. Waterman*, 10 Vt. Rep., 526.

* Where there has been no such practice as suffering his servant to buy upon credit; yet, if he do so buy, and the articles so bought came to the use of the master, the master will be bound to pay for them. Here justice requires that he should, and the law raises the promise, upon the ground that it is his duty so to do. I know it is said, that his liability in this case is founded on his subsequent assent. It may be this state of things furnishes evidence whence a subsequent assent may be presumed, yet if this presumption of assent were removed out of the way, by the most positive declaration of the master that he would never pay for them, yet if he used them, and availed himself of the benefit of them, he would be obliged to pay for them; for it remains as equitable that he should pay for them as if he had never declared that he would not, and as much his duty. It is not, therefore, his assent on which the plaintiff's right of recovery rests, but because it is a duty incumbent on him, which the law will enforce. The case is the same as if A be present with B, when B sells A's property to C: C will hold that property, not on any presumed assent of A, but because it would be unreasonable if C could not hold the property so sold, since A did not inform him that the property was his at the time of the sale. See authorities, *Ld. Raym.*, 224; 1 *Bl.*, 480; 1 *Pow.*, 781; 3 *Salk.*, 284; 1 *Show.*, 195; *Chitty*, 26; 3 *Term Rep.*, 757, 760; 10 *Mod.*, 101, 109; *Peake's Rep.*, 42, 154; 9 *Mod.*, 347.

When a servant acts by virtue of a general authority, and, within the scope of his employment, sells property, and warrants the goodness of it, the master is bound by the warranty, although he laid the servant under restrictions not to warrant, unless those restrictions were made public. But if a servant be especially authorized to sell a particular article, and be restrained by his master from making a warranty, and the servant should warrant, the master is not bound, and the purchaser buys at his peril: but in a case of special authority to sell, the master is bound by the warranty of his servant, unless the servant is particularly restrained. 7 *Rep.*, 177; 1 *Esp. Rep.*, 111; 10 *Mod.*, 109; *Cro. Jac.*, 469. (1)

(1) If a person keeping a livery-stable, and having a horse to sell, direct his servant not to warrant him, still the master would be liable on the warranty.

Whenever a servant is authorized to sell an article which is defective and unsound; the master, knowing this, is liable for the act of the servant. I lay down this broad proposition as law, notwithstanding I know that some authorities seem to militate against such a proposition. It is founded on the immutable principles of justice; and if the master had sold such articles himself, without disclosing the defect, he would have been liable. Agreeable to the maxim, *suppressio veri* lays a foundation equally strong to render the seller liable, as *suggestio falsi*. It can be no excuse for him to commit a fraud, through the medium of a servant. It is said, that if a master sends his servant to a fair, with an unsound horse to sell, that he is not liable to the purchaser, unless the servant was directed to sell to a particular person. I conceive such a rule to be opposed to the fundamental principles of law. The servant, when acting for his master in conformity to his authority, is not liable, unless he renders himself liable by a special contract; but if he subscribe his name in behalf of the master, when he has no authority so to do, it is a subscription by himself, and he is bound by the contract as effectually as if he had not inserted the words "in behalf of," &c., which he had no authority to insert. If he had signed his master's name only, without authority to do so, it would be difficult to subject him on an instrument signed in the name of another; but it would be fraud for which he would be liable. 2 Rol. Rep., 270; 3 Bur. [*370] 562; 2 Ves., 127; * 1 Pr. in Can., 128. The statute of

this state has introduced a new rule; it renders the par-

because the servant was acting within the general scope of his authority, and the public cannot be supposed to be cognizant of any private conversation between the master and servant. But if the owner of a horse, not being a dealer, were to send a stranger to a fair, with express directions not to warrant the horse, and the stranger acted contrary to his orders, the purchaser could only have recourse to the person who actually sold the horse, and the owner would not be liable on the warranty, because the servant was not acting within the scope of his authority. Chit. on Con., 216; East India Company v. Hensley, 1 Esp. Rep., 111; 15 East, 407. A servant, sent to deliver a horse previously sold, has no authority to warrant. Woodin v. Barford, 2 O. & M., 391. And if a servant, with orders to take a horse with a warranty, previously purchased by a master, take him without, there is no binding delivery to the master. Jordan v. Norton, 4 Mea. & Wels., 165. It has been held that a power to sell implies a power to warrant. Skinner v. Gunn, 9 Porter, 305; Gaines v. McKinley, 1 Ala. Rep., 446.

ent and master liable to fulfill all contracts made by their servants, while under their care and government, although these contracts were made in the name of the child or servant, and on account of their own business, provided the parent or master permitted the child or servant so to contract. By servants under the care of a master, I presume no others are meant but apprentices. Contracts by persons living as servants under age, though not bound by indenture, probably fall within this statute. S. C. of Errors, June, 1800; Statute, 437.

* CHAPTER VI.

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OF THE MASTER AND SERVANT, BOTH BEING LIABLE FOR THE INJURIES COMMITTED BY THE SERVANT PERSONALLY—AND THE CASE OF PERSONS SUFFERING BY THE NEGLIGENCE OF THE SERVANT. OF THE SERVANT'S LIABILITY TO HIS MASTER.

THE servant, together with the master, is liable to the person injured, by a wrongful act, committed by him and his master, or by his master's command. If the servant, in performance of his master's business, willfully commit an injury, both master and servant are liable; unless the late decisions in England should be considered as well founded. So, too, when an injury is sustained by the negligence, ignorance, or want of skill in the servant, both master and servant are liable; unless this negligence, &c., amount to a violation of a contract betwixt the master and servant, and the person injured. 6 Term Rep., 411; Stra., 108; 1 Wils., 228. In the case of the apprentice of the tailor, who injures a garment by undertaking to cut it out, this is a violation of an implied contract by the master; and the apprentice would not be liable, though the master would be. Cowp., 406; 1 Bl., 431. (1)

(1) See note to page 362 (marg.); *Sly v. Edgeley*, 6 Esp. N. P. Cas., 6; *Wright v. Wilcox*, 19 Wend., 345. One principle laid down in the text may well be doubted;

An officer, employed by a public body, to collect taxes, or rates, or customs, or duties, &c., receives money so collected, more than he ought, by mistake, and pays the money to his employer: he is not liable in an *indebitatus assumpsit*; but if he had it in his possession, he would have been liable. Cowp., 182; 1 Mod., 209.

The servant is always liable to his master for a violation of [*378] his duty, whereby the master is injured. (1) A servant * by law, is bound to perform the business of his master, with diligence and fidelity; and if, through a defect of these, his master is injured, he is liable to his master; but never for want of skill, or strength. Disobedience of orders lays no foundation for an action by the master, unless followed with real injury. Impudent, impertinent language is no foundation for an action. 10 Mod., 109; 2 Wils., 225.

This doctrine may be exemplified in the case of the attorney, who manages his client's cause with diligence; but through ignorance, does his client an essential injury. No action can be maintained against him, by his client; but if he had left his client's cause, when called for, and amused himself with hunting, or fishing, instead of attending his business in court, and his client's cause had suffered on this account, he would have been liable. 8 Bur., 364.

Again, a servant employed in transporting his master's goods, is robbed; if this robbery could not be guarded against, by any ordinary prudence, the master has no action against the servant:

that is, if the servant, in the performance of his master's business, *willfully* commits an injury, both master and servant are liable. The doctrine of *M'Manus v. Crickett*, 1 East, 106, is directly opposed to this, and that case has since been recognized as authority by the courts of New York and Massachusetts. *Foster v. Essex Bank*, 17 Mass. R., 508; *Wright v. Wilcox*, *ab supra*.

Master and servant are not jointly liable on the case for an injury, occasioned by negligence of the servant, while driving the horses and carriage of his master in his absence. *Parsons v. Winchell*, 5 Cush., 592.

(1) A servant using his master's property, in the performance of his duty, in a reasonable manner, and with common prudence, is not liable for any injury happening to it while in his use, although he may not be able to show any special direction from his master to use it at that particular time. *Hathaway v. Smith*, 2 Tyl. Rep., 348.

but, if the servant had exposed these articles in an unsafe place, and they were stolen, there would have been a want of fidelity. 3 Bur., 564; 10 Mod., 109. So, where the master has suffered injury, by the misconduct of the servant to others, by being obliged to answer in damages for such misconduct, provided the master was not in some way accessory to it; as, if the master be sued on account of his servant's having beat his neighbor's cattle unreasonably; if this were done by his master's command, the master can have no action. 2 Stra., 1088; 8 T. Rep., 186. But if this were done in the pursuit of his master's business, though against the will of the master, the master would be compelled to pay damages, and the servant would be liable to the master. (1)

(1) So in the case of principal and agent. The agent is at all times liable to be called to account for the manner in which he has transacted his principal's business, though he is not liable for not accounting until demand. *Sally v. Copps*, 1 Ala. Rep., 121. A demand on an agent for an account of the proceeds of goods sold by him, should be made at his residence, and sufficient opportunity given him for payment. *Hall v. Pecka*, 10 Vt. Rep., 474. But no demand is necessary where the agent denies his agency. *Tillotson v. McCrillis*, 11 Vt. Rep., 477.

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* CHAPTER VII.

OF THE MASTER'S RIGHT TO CHASTISE HIS SERVANT. OF THE MASTER'S RIGHT OF ACTION FOR ENTICING AWAY HIS SERVANT, OR TAKING HIM BY FORCE. OF HIS ACTION FOR BEATING HIS SERVANT, PER QUOD SERVITIUM AMISIT. OF THE MASTER'S RIGHT OF ACTION AGAINST THE SERVANT WHEN HE HAS BEEN ENTICED AWAY. OF THE MASTER'S ACTION ON THE COVENANTS IN AN INDENTURE, OR FOR THE PENALTY, WHEN A PENALTY IS ANNEXED. OF THE RIGHT OF MASTER AND SERVANT TO JUSTIFY A BATTERY IN DEFENSE OF EACH OTHER.

THE master has a right to give moderate corporal correction to his servant for disobedience to his lawful commands, negligence in his business, or for insolent behavior. This, however, is confined to apprentices and menial servants, who are members of his family; and not, indeed, to all such, if of full age, as hired men of full age; but only while the master stands *in loco parentis*, then such authority may be exercised: he has full authority over all slaves, apprentices, and others living with him, who are subject to the control of a parent or guardian. If other servants be thus corrected, they may leave the master's service. It is said the master's wife cannot correct a servant: this, I apprehend, is to be understood with some qualifications. If the person who lives with another in character of a servant to him, is of tender years, the principal care of such servant is commonly devolved on the wife: the chastisement of such person belongs to her in a special manner; without such power she could never discharge [*375] the duties incumbent* on her in educating the child. 1 Sid., 125; Cr. Car., 197; 1 Vent., 70; 8 Mod., 120; 3 Bur., 566; 1 Bl., 428. This right of correction is personal, and cannot be delegated to any one. (1) A schoolmaster, in his own

(1) The early authorities clearly sustain the principle of the text, that the master may moderately correct his servant for negligence or misbehavior. 1 Bl. Com., 428; 1 Hawk. P. C., b. 1, ch. 22, sec. 5. But this power does not grow out of the con-

right, and not by delegation, possesses this power. 9 Co., 76; 1 *Ld. Raym.*, 310; *Stra.*, 953; *Cro. Jac.*, 630. A master cannot justify a wounding of the servant. This term, as used in our books, must, I think, be such a wounding as furnishes evidence that the master acted *malo animo*, which will subject him to damages; for some wounding, according to the common acceptance of the word, might arise from very reasonable correction: and although, in pleading, it will be difficult to spread upon record the nature of the wounding, the master, if sued, must plead not guilty. Yet, I apprehend, the jury are not warranted to find him guilty for any the least wounding, provided they find the correction to have been given with a right temper of heart. It must be so disproportioned to the offense as to furnish evidence of the *malus animus*. 8 *Mod.*, 120, 218, 330; 1 *Sid.*, 177; 9 *Co. Litt.*, 76; *Cro. Jac.*, 866; *Ld. Raym.*, 360. A master, in chastising a servant, kills him; yet the case may be so circumstanced that it would be excusable homicide; he might have chastised in great moderation, without passion, and with a proper instrument; yet, by means of some unforeseen accident, which no human prudence could guard against, death might ensue, in consequence of the chastisement. The master might be guilty of involuntary manslaughter, under the influence of an unjustifiable passion, provoked by the behavior of the servant; he may have proceeded to such lengths in his chastisement as to have occasioned his death without any premeditated motive. The master might be guilty of murder, where death ensued in consequence of chastisement; the circumstances attending the case might be such that they would furnish *conclusive evidence of an unsocial heart, a temper of heart totally regardless of others, [*376] fatally bent on mischief: this may be collected, frequently, from the nature of the offense punished, the length and manner of the punishment, and the weapons used, &c. *Rol.*, 65; 1 *Hawk.*, 111.

tract of hiring, and its lawfulness has been denied by a writer of eminent authority, as not being consonant with the spirit and genius of the contract. *Taylor's Elements of the Civil Law*, p. 413. In Pennsylvania this right is expressly denied. *Commonwealth v. Baird*, 1 *Ashm. Rep.*, 267; and the better opinion now is that it cannot be extended beyond apprentices and menial servants under age. 2 *Kent's Com.*, 261.

Whenever a servant is enticed from his master's service, the master is entitled to his action of trespass on the case, with a *per quod*. If a servant be taken away from his service, his remedy is trespass *vi et armis*, with a *per quod*. If he go away from his master's service, and be retained by another who knows the fact of his having left his master's service, such person, so retaining, is liable to the master in an action on the case. *Ld. Raym.*, 1116; *Salk.*, 88; *Cowp.*, 56; 3 *Salk.*, 391; 2 *East.*, 8, 18; *Esp.*, 645. (1)

The forcible taking away of a servant is also an offense punishable by information; it is a breach of the peace; but enticing from the master's service is only a civil injury. *Ld. Raym.*, 1116.

If a servant be beaten by a stranger, so that any loss of service is incurred by the master, the master is entitled to his action of trespass, and with a *per quod*. He is not to recover for the battery itself; the damages for this belong to the servant: but for the damages to himself, occasioned by this battery, in the loss of service, this doctrine obtains only in those cases where the loss of service must fall on him; as in the case of slaves, apprentices, and his children, and all others to whom he stands in *loco parentis*; but not for a disappointment in his business, as where his hired servant has been beaten; for in this case the servant bears the loss, and is not entitled to wages during the time that he is disabled by battery. Another ground of recovery in such case is, the expense occasioned the master by the battery, whenever this expense falls upon him; as in the case of slaves,* [*377] apprentices, children, &c., he is entitled to recover for it. But in case of a hired servant, the servant must, ultimately, be at all the expense himself; and such expense will be a part of

(1) *Leward v. Basely*, 1 *Ld. Raym.*, 62; 1 *Salk. Rep.*, 407.

To maintain an action for enticing away a servant, there must be proof of a service owing to the plaintiff, by virtue of an agreement on the part of the servant himself, or of some other person having authority to bind him to service. *Campbell v. Cooper*, 34 *N. H.*, 49. To induce a servant to leave his master's service when the time for which he has hired himself shall expire, although he had previously no intention of quitting such service, is not the subject of an action. *Boston Glass Manufactory v. Binney*, 4 *Pick.*, 425. The hiring of a person of full age by the year creates the relation of master and servant between the parties, and will enable the employer to maintain case, against one who imprisons the person employed, for the loss of his services. *Woodward v. Washburn*, 3 *Dens.*, 369.

the damages, which belong to him. If the beating be such as occasions no loss of service, the master is not entitled to recover anything. 10 Co., 180; 1 Sid., 175; Cro. Jac., 618; 2 Rol., 682.

It is laid down in all the books that, when a servant is so beaten that he dies, the master has no remedy; for the civil injury is merged in the felony. On what principle does this doctrine rest? When one man has done another an injury, because it is of such a nature that he deserves death, surely this is not a reason why the injured person shall have no remedy. I apprehend that the figurative language, that the civil injury is merged in the felony, is incorrect. The real ground on which this doctrine exists is, that both the life and estate of a felon are forfeited. An action would, therefore, be fruitless. If this be the principle which governs in such cases, then, in this country, and those States where there is no such forfeiture, the civil injury is not merged.

When a servant leaves his master by enticement, the master has his remedy against the servant, as well as against the enticer; and is entitled to recover damages against either, but not both. The real gist of the action, in both cases, is the wrong; and where damages are recovered against one for the same wrong, the recovery against one is a bar to a suit against another, whether there has been satisfaction or not. 8 Bur., 1845; 1 Bl. Rep., 887; 7 Bur., 116; Esp., 319. When an action is brought upon an indenture, because the apprentice left his master's service, and there is a penalty annexed to the indenture, the action may be brought for the penalty, * or on the covenant in the indenture. If the action be brought on the covenant, the [*378] penalty is no measure of damages; for the plaintiff may recover more or less than the penalty; and, in such case, no action can be sustained for the penalty. But if the action be brought upon the penalty, that penalty is to be recovered; and no action can be sustained on the covenant.

The master and servant, by reason of their relation to each other, may justify certain acts, which others cannot do. Thus, a master may assist his servant to carry on a lawsuit, which could not be done by another, without incurring the crime of

maintenance. So, too, the servant can justify a battery in favor of his master; that is, may do everything in his master's defense that his master might do in his own. Whether a master can thus justify a battery in defense of his servant, seems to be an unsettled question. The authorities on this subject are directly opposed to each other. The better opinion, I believe to be, that this right is reciprocal. It is the servant's duty to defend his master; and it is the master's interest to defend his servant. That property which the master has in the servant, may be as valuable to him as his goods and chattels; and, surely, if any one, by violence, should attempt to take them from the possession of the owner, he may defend them by committing a battery. 2 Rol., 1151, 540; 1 Bl., 429; Ld. Raym., 62; Salk., 407. (1)

(1) That the servant may justify a battery in defense of his master, the books do not admit of the slightest doubt; but it may be questioned whether the master may do the same thing in defense of his servant. In *Leward v. Basely*, Ld. Raym., 61, the court held that he could not, on the ground that the master had his remedy for the battery of the servant in an action *per quod*: the weight of argument, however, is on the other side. 1 Bl. Com., 429; 1 Hawk. P. C., b. 1, ch. 60. In Louisiana, it is provided by statute that a master may justify an assault in favor of his servant, and the servant in favor of his master. Civil Code, La., art. 169.

POWERS OF CHANCERY.

*CHAPTER I.

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OF THE PRINCIPLES WHICH GOVERN IN DECREETING A SPECIFIC PERFORMANCE OF CONTRACTS. WHEN A COURT OF CHANCERY WILL DECREE A SPECIFIC PERFORMANCE.

OUR books which report the decisions of courts of chancery, and many excellent elementary treatises respecting the power which they exercise, have disclosed to our view a noble system of jurisprudence; the absence of which would render the science of law dry and barren indeed. The object of this treatise, is, to point out the principles which govern courts of chancery, in that vast variety of subjects over which they exercise judicial authority. This cannot be done, without, in some considerable degree, explaining those subjects over which they exercise that power. But as a full explanation of these subjects is not intended, they will be no further considered, than is necessary to point out the particular ground on which they exercise a power over them. A fuller explanation of the law respecting those subjects, with which courts of chancery are conversant, will be found in a subsequent volume, if my health be spared. Much has been said respecting the difference betwixt a court of law and a court of chancery. That there is a difference, in a great variety of particulars, is most clear; but I have not seen such an explanation of the difference, as is satisfactory to my mind.

* Lord KAIMS supposes the principal difference consists in this: that it is the province of a court of equity to [*880] abate the rigor of *summum jus*; and, secondly, that a court of equity decides according to the spirit of the law, and not as a court of law, according to the letter. Nothing can be more incorrect than such an opinion. A court of chancery lays no claim

to a power to dispense with the law of the land, or, in any measure, to abate its rigor; although it is true, that, in particular cases, the rules of law operate inequitably, and may be said to work extreme hardship; yet, in such cases, if it appears, upon a fair construction, that such instances are within the rule of law, it is impossible for a court of equity to afford any relief; it being clear that equity cannot control the law. As to the second, a court of chancery is as much bound as a court of law, and no more, to decide according to the spirit of the law. It is a maxim of the common law, that the rule of construction is the same in both courts.

By others it is said, that frauds, accidents, and trusts, are peculiarly cognizable in equity. This conveys to the mind no definite idea, unless it is intended thereby to teach us this doctrine, that they belong exclusively to courts of equity; which is not correct; for many frauds are cognizable in courts of law. Whenever a compensation in damages is sought for fraud, it is by action at law; and, in case of fraud in obtaining a devise, a court of law has exclusive jurisdiction. Many accidents are also remedied in a court of law; as where a deed, or other instrument in writing, is lost by time and accident. So mistakes in settlement, are also rectified by an action at law, pointing out the mistake; and the remedy is at law, when a contingency happens, rendering the performance of a condition impossible. Trusts are not exclusively remedied in a court of equity. In the case of bailment, the remedy is at law. So, too, in an action for money [*381] * had and received, such trust is cognizable by a court of law.

Others have said, that courts of chancery are not bound by precedents. Whatever looseness there might formerly have been in these respects, the chancellors now feel themselves as much bound by precedents, even by those which, in their minds, are objectionable, as the judges of a court of law do. A court of chancery differs from a court of law, in these respects, by means whereof they take cognizance of controversies, viz., in granting specific relief,—in the mode of trial, and in the mode of proof,—and in having a concurrent jurisdiction, in cases of trusts, with a court of law,—and over some cases, which cannot be referred to

the head of specific relief, because the relief given is the same as is given in a court of law. It is true, the mode of trial in a court of chancery, is different from that in a court of law; but, by this means, their jurisdiction is neither increased nor diminished. On this head, nothing need be said, as it does not respect the present inquiry.

A court of chancery, in the exercise of its power of granting specific relief, will decree the performance of an executory agreement; and will also decree the delivering up of securities, deeds, and written instruments, that are wrongfully detained; and will grant injunctions to prevent injuries; and will rescind contracts, which ought not to be enforced; and, in the exercise of their power over testimony, different from a court of law, will compel a party, under oath, to disclose such facts as may affect the rights of his opponent, which rest in his private knowledge only; and will order books, and other written documents, to be produced, which a court of law will not do. In the exercise of their power over trusts, they will compel a trustee to fulfill his trust, in all cases where the trustee was intrusted to do a collateral act, and in some * though not in all cases, where the thing [*382] to be done, was the payment of money.

In the exercise of these several powers, there are certain maxims which govern their conduct; which are as follows:

Chancery does not interfere, when there is an adequate remedy at law. Whoever asks for equity, must do equity. When chancery decrees a specific performance of a contract, it orders, also, the applicant to do that which he was bound to do. When chancery rescinds a contract, all parties are restored to the situation in which they were before the contract was entered into. Chancery never decrees the execution of a contract, where there has not been the utmost fairness; nor where it was not originally mutual; nor in favor of a mere volunteer. Once a mortgage, always a mortgage. What is agreed to be done, is considered in chancery, as done. Whenever one person takes an undue advantage of the situation of another person, and by this means obtains a bargain beneficial to himself, and injurious to the other man, chancery will relieve against such contracts. In the exercise of granting specific relief, chancery decrees a specific per

formance of many contracts; and if the promisor, obligor, or covenantor, fail to fulfill his contract, the remedy at law is a compensation in damages, for a breach of the contract: but equity orders the contract to be performed, in the terms of it.

A covenants with B, to sell to him Blackacre for such a sum, to be paid by such a time, &c. ; and A refuses to fulfill his covenant; he is liable in an action on this covenant, and B will recover such damages as he has sustained; and upon payment of such damages, A is discharged from all other claims of B, by virtue of that covenant, either in law or equity. But, if B had chosen so to have done, he might have filed a bill in chancery, [*383] praying for * a conveyance by A to B, of Blackacre; and thus chancery would decree, if A could not show any substantial reason why he ought not. To enable chancery to decree specifically, the performance of a contract, it is a general rule, that such contract must be valid at law. The existence of a power in chancery, to give effect to a contract disallowed at law, would be exalting the judicial above the legislative power, in the very thing in which the appropriate power of the legislature is concerned. This would introduce confusion in all legal proceedings, and utter certainty, as to what the final result of any cause would be, on application to chancery.

The interposition of chancery is not, then, because the law cannot afford a remedy, in such case to B; for it certainly could: the reverse is the truth; for if there had been no remedy at law, there could be none in equity. The remedy in one court, is very distinct from the remedy in the other; but when the remedy is had in either court, it is considered as a full remedy. So that there cannot be a remedy in both courts, though it may be had in either. It is sometimes asked how is this consistent with the rule, that chancery does not interpose when there is an adequate remedy at law? It is the very ground on which chancery treads, when relief is granted; for in those cases where chancery grants relief specifically, it is because a sum in damages, the only remedy afforded by a court of law, is not viewed in equity, as an adequate remedy; and whenever equity views a sum of money as an adequate remedy, it refuses relief; and for this reason, ordinarily, a court of chancery does not decree a specific per-

formance of a contract respecting personal property. If A be bound to deliver to B a horse by such a time, and then refuses, chancery will not decree a specific performance; for a sum in damages is considered as an adequate remedy. In a concern of this nature, where the * money recovered can be applied, [*384] if the owner chooses, to purchase articles of the same quality, which will be equally beneficial as the article promised; as if A have promised to deliver to B, one thousand bushels of wheat, and fails; the damages given for non-performance will purchase the same article of as good a quality as that promised; but where real property is concerned, the case is widely different. It is often a matter of great importance, that the purchaser should have the identical thing purchased. It may be a dwelling house, when no other could be had, convenient to his plantation; it may be the only tract of land that can be conveniently purchased, in the neighborhood in which he lives; and may be not only a matter of convenience that he should possess it, but essential to the value of his farm. When a case of a personal nature occurs, where damages are not an adequate remedy, chancery will grant a specific remedy. If a family picture should be withheld from the owner, chancery will decree specific relief; for damages, in such case, is not considered an adequate remedy. If injustice will be done in consequence of refusing specific relief, chancery will not refuse it.

A, who is insolvent, has obtained a judgment against B; at the same time, B has demands against A; and if he should pay to A the judgment, he would not be able to collect his demands of A: in such case B may apply to chancery, for a decree to set off his demands against A's, so that justice may be done; and thus chancery will decree, and grant specific relief. For in such case, B's remedy, in a court of law, would not be effectual, by reason of A's insolvency. By the set-off in equity, justice is done, and B has now an adequate remedy.

The power of granting specific relief, which is now one of the most prominent features of that noble system of jurisprudence, which prevails in a court of chancery, * was un- [*385] known to the ancient common law of England; neither was it introduced into the English code of laws by any statute, but

gradually grew up to the perfection to which it has now attained, under the fostering hand of those great men who have, for a succession of ages, presided in those courts. It seems to have been understood, at a very early period of English history, that when a person supposed that justice was due to him from another, and he could not obtain it by the ordinary course of legal proceedings, that he might apply to the king, as *pater patriæ*, who was bound to see that justice was administered to his subjects. As it was impossible for the king, personally, to administer justice to them, amidst all his numerous avocations, the necessary consequence of his elevated station, he appointed a chancellor, to whom was committed the duty of hearing the applications of the king's subjects, for that justice which they claimed as their due, and which they could not obtain in a court of law. It is highly probable that when this branch of the royal prerogative was first committed to the chancellors, when the system which now beautifies and strengthens the kingdom, was in its infancy, that causes were determined *pro arbitrio judicis*, as the particular justice of each cause seemed to require; but with little regard to that general justice, which the good of community demands should, in a special manner, be attended to; and this, no doubt, gave rise to the opinion, that the object which was especially regarded by chancery was, to abate the rigor of *summum jus*.

Since the law of chancery has been matured, by the wisdom of those great men, who from age to age, have held the office of chancellor; there is no room for such observations: precedents [*388] have the same binding force in a court of chancery, as in a court of law. In the time * of Edward IV, this power of granting specific relief, first began to be exercised by a court of chancery; and has been continued from that time to this. It was resisted by the court of king's bench for a considerable time, but chancery triumphed; and ever since the reign of James I, has remained undisturbed.

The general rule is, that when damages are recoverable at law, for the breach of a contract respecting real property, chancery will decree a specific performance of such contract; but this is not a universal rule; for there are cases where a recovery of dama-

ges may be had at law, where a court of equity will not decree a specific execution of the contract. It is discretionary with them, whether they grant such relief or not. It is a sound discretion, by which they are governed. They do not refuse to grant such relief from whim or caprice, merely because they will not; but when it appears to them, that it will not subserve the cause of justice to grant such relief, they leave the party to his remedy at law. Whenever the bargain appears to be a hard bargain, bordering on oppression, and where there is a want of the most perfect fairness, or any concealment of any fact, which it would have been ingenuous to have disclosed, or if any advantage has been taken of superior skill in any science, by means whereof, a beneficial bargain has been obtained; a court of equity will refuse to decree a specific performance, although the bargain is not so corrupt as to induce them to rescind it; but they leave the party to his remedy of law, without affording him any countenance from a court of equity: much more will they refuse to decree a specific performance of such a contract as may be rescinded, or relieved against, either at law or equity. So, too, a court of equity will not decree the performance of a voluntary covenant in favor of a volunteer; for although damages are recoverable in such a * case they would be only nominal; [*387] a specific performance, if decreed, in point of value, would exceed the damages to which the covenantee was entitled: it would be the whole value of the thing covenanted to be done; whereas, for a breach of said covenant, the covenantee was entitled to nothing more than nominal damages: to enforce a specific performance of such covenant, would be to afford a remedy, more than adequate. So, also, where A has contracted to convey real property to B; if he refuses, he is liable in damages to B: or he will be ordered by a court of chancery to convey as he agreed to do. Yet, if C have purchased of A, the things agreed to be conveyed to B, without notice of that agreement, no decree will pass against C, the *bona fide* purchaser; and B will be driven to his action at law, as his best remedy. By this, it is not meant to convey the idea, that equity will not decree that A convey, by a good title to B, as he agreed to do; but this will not afford to B, a specific remedy, if C refuse to reconvey to

A; for although it may be impossible for A to induce C to convey the title, either to him or to B, yet, this does not take from a court of equity, the power to decree that he do so convey. For, whenever the impossibility of doing a certain act, is created by the act of him who agreed to do it, chancery will decree the thing to be done; and if it shall remain impossible to be done by him, as in the case put, where A cannot prevail upon C to part with the thing conveyed to him, whatever it may be, house or lands; in this case the decree is enforced, by setting a penalty on A, if he does not convey, as ordered by the decree. So that the event will be, that B is entitled to the penalty, though he cannot have the house or land. This penalty he can recover, which is in nature of damages, for the breach of the covenant. This is a perfectly reasonable exercise of power; for, if A will by his own act render it impossible * for him to perform his [*388] own contract, he is not entitled to any peculiar indulgence; chancery may decree that he shall perform it, and it may become possible; for he may find it for his interest to procure the title from C, which in such case he will do, rather than to pay the penalty; and if he cannot, the penalty set by the court, will be reasonable: nothing will be done by way of punishment; the penalty will be such as will secure to B, ample, but not vindictive damages; and is always subject to the control of the court, until it is paid: so that if A, after the penalty is incurred, should procure an authentic title of that which he was decreed to procure, and apply to chancery, on submitting to pay such sum in damages, as it was reasonable for B to receive, and to give such title to B as he was ordered to give, he will be released from the penalty.

In the exercise of this power we see no difference, in principle, betwixt courts of law and courts of chancery but what consists in the different remedies. Is the contract void at law, so that no damages could be recovered? So it is in equity; so that there can be no specific performance decreed. It is an invariable rule in chancery, that, whenever a decree for the specific execution of a contract is obtained, the applicant shall be enjoined to perform that which he, by the contract, was bound to perform; for the maxim in equity is, that he who asks for equity must do equity.

It may be that the time has not arrived when it was his duty to perform that which he had contracted to do: in that case he will be enjoined, under a penalty, to perform what he was bound to do, when that time arrives.

There are cases where, after the contract was entered into, a complete performance has, by reason of some statute, become illegal; whilst a partial performance would be legal. In such case, chancery will decree a partial * performance, provided the party claiming the performance desires it; as was [*389] the case where the bishop had agreed to lease the church-lands for seventy years: but, before the time had arrived when the lease was to be given, a statute was enacted forbidding the bishops to lease the church-lands for a longer period than forty years. The bargainee then applied to the bishop for a lease of the land for forty years; and, upon the bishop's refusal to give such lease, applied to chancery for relief. Chancery decreed against the bishop that he should lease said lands for forty years, so agreed to be leased. It is apparent that no injustice was done, if the bargainee was willing to receive a lease for forty years, instead of seventy years. The bishop could have no ground for complaint; for it was certain that he had agreed to lease the land for that length of time; for he had agreed to lease it for a longer time, and *omne majus continet minas*; and the reason why the plaintiff could have no remedy at law arose only from a technical difficulty. If the suit was brought, it must be on the agreement; and on that there could not be a recovery, by reason of the statute; and the evidence that the bishop could lease for forty years could not support a declaration on an agreement for a lease for seventy years.

It will often happen, when a person applies for relief, that he is not entitled to obtain it unless something is performed on his part. It may be that he ought to pay to his antagonist a sum of money; and the controversy respects the sum which ought to be paid. In such case, the applicant must offer to pay such sum as the court shall order to be paid; and chancery will grant him relief, on condition that he pays such sum.

Whenever it appears, from the contract, that the obligor was to have his election, either to pay a sum of money, or to perform

[*390] the thing agreed to be done, the * court will not decree a specific performance, but will leave the party to his remedy at law, to recover the money; for a suit at law, in such a case, is an adequate remedy.

A contract is often so made that a party agrees to do a certain thing, or to pay a sum of money. If it can be discovered that the penalty annexed was to enforce the performance of the contract, the court will decree a specific performance. If it were in nature of assessed damages betwixt the parties, the court will not decree a specific performance; for it was intended that the promisor should be at liberty to do that which he chose to do; and the law affords an appropriate remedy, viz., a suit to recover a sum of money which it was agreed that he should pay, if he did not perform the specific act agreed to be done; and whether the non-fulfillment of the contract was intended as a penalty to enforce the performance, or was damages assessed betwixt the parties, is to be learnt, not only from express words, but also from the nature of the transaction. The sum to be paid will often furnish satisfactory evidence which was intended; as if A should contract with B that he would not sell any article of grocery in the village of E, and lays himself under a penalty of one thousand eagles if he do; and it so happens that he sells six gallons of brandy in the village of E; it is easy to see that this sum ought not to be considered as assessed damages, but a penalty to enforce the contract. On the other hand, if A had leased to B thirty acres of land, some of which was plough land, and some meadow, at the rate of two dollars per annum for each acre; and if B should plough a certain four acre lot of the thirty acres, that he should pay two dollars and fifty cents per acre for those four acres; in this case, it is easy to see that the fifty cents per acre for the four acres was in nature of assessed damages.

[*391] * If A makes an agreement with B to sell him certain real property, if the terms be settled, and the formal part or execution only remains to be completed, a court of chancery considers the property as transferred from the time of making the contract, even if some after time is fixed for the execution of the contract. The vendor, from the time of making the contract, is viewed as a trustee to the vendee of the land, and the vendee

as trustee of the money for the vendor; and chancery will compel the fulfillment of all trusts. From this doctrine, some important consequences follow: If this property, so contracted to be conveyed, should be destroyed by some inevitable accident, as was the case of a loss of real property in the island of Jamaica by an earthquake, it is the land of B. So, too, if A, the seller die, it is the land of B, and the executor of A is entitled to the purchase-money. If B, the vendee, die, the land, so agreed to be purchased, descends to the heir. If B had made his will, and devised all his real property, such land would have passed to the devisee, by the terms real property. So, too, where there are articles of agreement, in cases of marriage settlements, that so much money shall be laid out in the purchase of land, this money is considered as land; yet the person who is entitled to the benefit of the money may, at his election, consider it as personal or real property, and may bequeath it by a will that will pass personal property. Money, agreed to be laid out in land, is subject to the husband's curtesy, but not to the widow's dower; which mars the symmetry of the law upon this subject. 2 Pow., 83, 112, 236, 248; 1 P. Wms., 438; 3 *ibid.*, 224; Pr. in Can., 397; 1 Ver., 588; 1 P. Wms., 61; 1 Atk., 572; 2 P. Wms., 56, 79, 232, 68; 11 Mod., 468; 3 P. Wms., 215; 1 *ibid.*, 710.

If a contract were originally mutual and equal, chancery will enforce a specific execution of it, although, by *subsequent events, it has become unequal: as where A received of B [*392] a sum of money, and gave to him an annuity therefor during his, A's, life. A was a man of sound health, of about thirty years of age. Within one month after the receipt of the money, A died; so that B lost his money; but there was nothing unfair in the contract: it was equal, when made; but became unequal afterwards, by the act of God. By the contract, B was to pay the money by installments; which the court decreed should be done. If it should be asked upon what principle chancery interfered, as there was nothing but money to be recovered, and that might be recovered by a suit at law, the answer is this: that, although it is a maxim in a court of equity not to interfere where there is an adequate remedy at law, yet, if the contract be of such a nature as it would be proper for one of the parties

to apply to chancery for specific relief, the court will grant relief to the other; although nothing but money can be recovered in any court, and that may be recovered in a court of law: As where A enters into an engagement with B to convey to him Blackacre; for which B covenants to A to pay to him two thousand dollars. In this case, if A had refused to convey Blackacre to B, B might apply to chancery for a decree that A should convey to him Blackacre, according to the agreement. Here B had the privilege of seeking specific relief. So, also, A is permitted to apply to chancery for a decree that B pay to him two thousand dollars, according to the agreement. So, in the case of the annuity, which is real property, B might have applied to chancery if A had refused to execute the conveyance of the annuity, to compel him to do it; and B, in his turn, can apply to chancery to compel A to pay the money. 2 Bro. Can. Ca., 415; Pra. in Can., 156; 2 Pow., 182, 219.

[*393] *The statute of frauds and perjuries requires that all contracts respecting lands should be in writing; and yet we often find a court of chancery decreeing a specific execution of a parol contract respecting lands. When any person applies for the specific execution of a parol contract respecting lands, if there be nothing more in this case than this; that such parol contract exists as he claims, and he offers to prove the terms of the contract by the witnesses who heard it; such an application must fail, and will be rejected by a court of chancery. It is not the object of this treatise respecting the powers of a court of chancery to point out the law of contracts, any further than is necessary to show in what cases chancery grants relief that cannot be had at law, and to investigate the principle on which this relief is granted. On a review of the decisions where applications have been made for the specific execution of a parol agreement respecting land, it seems difficult to ascertain, with precision, the governing principle in many cases, arising from what appears to me contradictory decisions, wholly irreconcilable.

It is said chancery will so mould contracts as to prevent any fraud being successfully practised; and, although every man may refuse to fulfill a parol engagement respecting lands, if

nothing more than this privilege be claimed by the promisor, yet, if he attempts to derive to himself any other advantage from such promise than that of refusing to fulfill his contract, it is a fraud which chancery will correct by compelling him to a specific performance of the parol contract. As, when A agreed with B to lease to him a farm of land for twenty years, and, as part of the consideration for the lease, B agreed to build a barn on the premises. B entered, and built the barn. A evaded giving a written lease, from time * to time. At length, he refused to execute a lease; and warned B to leave the premises. B filed a bill to compel A to fulfill his promise. In this case the court decreed that he should execute a lease, as he promised; for he had not barely refused to fulfill a parol promise, which he might have done, but had made use of the privilege afforded him by the statute to gain to himself a barn built on the premises. There could be no way to grant specific relief against this fraud, but by decreeing a fulfillment of the contract. From this case we should conclude that, as a fraud was claimed to have been practised, and fraud cannot be proved otherwise than by parol testimony, therefore it is to show the fraud that the parol agreement is admissible testimony; and, being proved, it is competent to a court of chancery to grant relief. The principle is this: Equity will not permit the defendant to commit a fraud, by pleading that a contract is not in writing; and there is no method to give specific relief but by decreeing the parol contract to be executed. 2 Ver., 454, 456; 2 Stra., 788; 1 Atk., 12; Pre. in Can., 519. In the last case, much money was expended in repairing the premises. 2 Free., 268. Where a wall was built, the defendant was not allowed to avail himself of the statute; for it would be a fraud to suffer him to take the benefit of an improvement made by another. If this were, indeed, the principle, it would follow, then, if money were expended in making repairs, building convenient outhouses, and the like, relying on the parol agreement, although it was no part of a parol contract that this should be done, that, in such case, the defendant could not avail himself of the statute; for it would be a fraud. But Lord ROSLYN's opinion, in the case of *Wells v. Stradling*, 2 Ves., 379, was, that he could avail himself of the statute, if it were no

part of the contract that it should be so laid out. So, also, was the decision in 1 Vern., 151. * If these cases are correct [*395] law, the principle is not that the court will not suffer the defendant to commit a fraud, by taking benefit of the expenditures of the plaintiff; for this fraud is as effectually perpetrated where the terms of the contract did not call for the expenditure as where it did. But, in the case in 2 Free., 268, the building of the wall was not called for by the terms of the contract; and it was holden that the defendant could not shelter himself under the statute. This case is directly opposed to Lord ROSLYN's opinion and the case in 1 Vern., 151.

Again, the opinions in the books are wholly irreconcilable on the question whether the payment of money, on the footing of a parol agreement, takes the case out of the statute. In the following cases, the court suffered the defendant to avail himself of the statute, notwithstanding money was paid in performance of an agreement by parol. Pre. in Can., 560; 2 Eq. Ca. Abr., 46; Lefroy, 22. In the following cases it was holden that the payment of money, on the footing of a parol agreement, took the case out of the statute: 1 Vern., 472; 3 Atk., 1; 4 Ves., 720.

If it be no fraud to receive another's money on the footing of a parol agreement, and then to refuse the fulfillment of that agreement, then the cases in Pre. in Can., Eq. Ca. Abr., and Lefroy, are correct; if the governing principle of the interference of chancery were to prevent fraud. But if it be a fraud so to do, then they are incorrect; and the cases in 1 Vern., 3 Atk., and 4 Ves., are correct; which proceeded on the ground that the prevention of fraud was the reason why they were supposed not to be within the statute. There is another class of cases which, to my mind, are irreconcilable; and I cannot perceive that, in any of them, the governing principle of interference could be the prevention of frauds. I allude to those cases where it is [*396] contended that, if the defendant * confessed the parol agreement in his answer, the court would decree the performance of it, although he insisted on not performing it, claiming that he was protected by the statute of frauds. This doctrine was holden in Pre. in Can., 208, 374; 2 Atk., 155; 3 *ibid.*, 1. A

different doctrine was holden, 2 H. Bl., 63; 2 Bro. in Can., 568, 565; 4 Ves., 23; 6 *ibid.*, 37. If the former cases be correct, the principle must be that there was indubitable proof of there being an agreement; and if the court could find the proof that there was an agreement, without learning the terms of it from witnesses, they would decree the execution of it, although it was a parol agreement.

One thing seems to be admitted by all: that, if the defendant admit the parol agreement, and do not insist upon the statute of frauds, the court will execute it. Whence do they derive this authority? If the contract be void, how can they execute it? It is true the admission proves, without danger of fraud or perjury, that there was an agreement; but it was a parol agreement, which the statute declares to be void. Can it be on any other ground than this, that they have arrived at the evidence of there being such an agreement, without danger of the mischief being incurred which the statute intended to prevent? 4 Ves., 39, 548. But this is as effectually accomplished where the parol agreement is admitted, but the statute is insisted upon, as when it is not insisted upon. If the reason why they cannot decree is, that it is a parol agreement, it will remain a reason when it is not insisted upon. If the reason why they decree in cases where the statute is not insisted upon be, that it is out of the danger guarded against by the statute, so, too, are the cases out of the danger guarded against, where the agreement is admitted and the statute insisted upon. The cases where the court have refused to execute an agreement when admitted, if the statute of frauds and perjury * were insisted upon, are, to my mind, wholly [*397] irreconcilable to an established practice in chancery; as where a bill is filed for the performance of a parol agreement, without stating it to have been in part executed, appealing to the conscience of the defendant whether such an agreement existed or not; on such an appeal to the defendant's conscience, the court compels the defendant either to admit or deny the agreement. Why should this be done? Of what use is it, if the defendant may admit, and then prevent its being executed, by insisting on the statute of frauds and perjuries? If it would answer no purpose, there would be an impropriety in compelling

the defendant to make a discovery. In the case of *Child v. Godolphin*, cited in 2 Bro. in Can., 566, Lord MACCLESFIELD declared, that the defendant, if he meant to avail himself of the statute, ought to have denied the agreement; for, says he, if he confesses the agreement, the court will enforce it. So Lord THURLOW, 2 Bro. in Can., 659, on a bill praying for discovery and relief, where the defendant pleaded the statute, both as to the discovery and relief, says, that if nothing is stated on the bill but a parol agreement, if the defendant pleads, he must support his plea by an answer denying the parol agreement. For what reason is it, that the statute may be insisted upon, and pleaded to the discovery? It could be for no other than this only: that, if the agreement was disclosed, it would be decreed that it should be executed; and he declares, that the only effect of the statute was, that the agreement should be proved *aliunde*; that is, not by witnesses to the contract, where there was no danger of fraud, perjury, or mistake; but there was none when the agreement was admitted; and this is entirely correspondent with those cases where the decree has been enforced when the agreement has been admitted, although the statute was insisted upon.

[*398] * In all this class of cases, it seems to me, that the real ground on which the court has proceeded, in decreeing a specific execution, is, that they had, by a legal course, come at the evidence that there was an agreement. Although it was a parol agreement, yet, as, in such cases, there was no such danger as was guarded against by the statute, the court found no difficulty in decreeing an execution of it. This appears to me, the better opinion; for those who have decided thus, to say the least, are as respectable as those who have decided otherwise; and the cases in which that opinion has been adopted, are the most numerous; and all of them are agreed in one point, that the agreement, being a parol agreement, is no objection, if the statute be not insisted on by the defendant; and also the compelling of the defendant to answer to a bill of discovery, whether there was an agreement or not, when this would be perfectly idle, as its being parol was pleaded to the discovery.

There remains to inquire, what is the principle on which the court has ever decreed, that when there was a parol agreement,

and a delivery of possession, that there should be a specific execution of this agreement? This was done in the case of *Butcher v. Stapeley*, 1 Vern., 465. What renders it difficult to determine, is, that the cases on this point also are not reconcilable. In a case, Pre. in Can., §61, a doubt is expressed as to this point. So, in the case of *Smith v. Turner*, a promise of lease, though accompanied with possession, was held to be within the statute. This case, in principle, is opposed to the case of *Butcher v. Stapeley*. There is no difference in the cases, only one was an absolute sale, and the other a lease for years: but this is not material, for they both are contracts respecting land.

A continuance in possession, after the expiration of a former lease, affords no proof of any agreement for a * lease. [399] No lease, in such case, will be decreed: but on payment of an increased rent, according to the terms of a parol agreement, it will be decreed. From these cases, though contradictory, the better opinion seems to be, that when possession has been delivered, a fulfillment of a parol contract will be decreed. That it has been decreed in some cases, is indisputable. Could this be on the footing of any advantage derived to the defendant, by fraud of the transaction? It does not appear that there was any other fraud but refusing to perform what he had by parol promised to perform, respecting lands; and all admit that he may legally do this. If we once admit the principle, that we can ascertain the fact that there was such a promise, from any quarter except from witnesses to terms of the contract, the court will decree the performance of it.

The defendant, by putting the plaintiff into possession, has furnished evidence that there was a contract; and the plaintiff, being placed in such a situation, must be at liberty to prove the contract: for if he was not at liberty to give in evidence this agreement, he would be considered as a trespasser.

The contradictory opinions respecting the cases of parol contracts, when they are to be executed, and when not, render it difficult to elicit the principles on which chancery has proceeded: yet I believe it will be found, that in all cases where courts of chancery have decreed a specific performance of a parol contract, respecting real property, they have preceded on one of these

grounds; either that it was necessary so to decree, to prevent fraud; (for before the statute of frauds was enacted, chancery relieved against fraud in a contract; and the statute requiring that certain contracts should be in writing, did not validate the contract, if it were infected by fraud;) or because they were enabled, on legal grounds, to prove a * contract by evidence, not within the danger of the mischief, which this statute meant to prevent; a principle perfectly well known to be received in analogous cases.

Hence it is, that facts are admissible, which prove, incontestably, that a conveyance is a mortgage; although, on the face of it, it appears to be an absolute deed: such as leaving the vendor in possession a number of years, and demanding no rent, and the vendee retaining in his hands the note, bond, or claim, which was the consideration for which the deed was given. On this note the vendee receives of the vendor the annual interest. If this conveyance is not a mortgage, it is opposed to all the transactions of men; for, when the grantee makes an absolute purchase, he does not leave the grantor to enjoy the premises, unless he pays rent; but it is, as is always practised by mortgagor and mortgagee. Again, if A should convey his farm to B, by an absolute deed, to pay a debt which he owed to B, by bond; and then leave the bond in the hands of B; or if it had been left by mistake, he would not pay interest upon a debt that he had already paid by an absolute deed of his farm: nor would B ask for the interest; but A would demand his bond. All this is directly opposed to the idea of an absolute deed, in the case put; and precisely what would be done, if there was a mortgage. All this proves, that there was an agreement; that the conveyance was a mortgage, a security for the debt. But it proves only a parol agreement; but notwithstanding this, it is recognized by chancery, as a valid agreement. Such an agreement could not have been proved by witnesses, who heard the terms of the agreement; but may be proved by facts that speak an unequivocal language, that cannot be mistaken; for here there is no such danger of fraud, mistake, or perjury. Pow. on Mort., 65.

[*401] * A court of chancery will refuse to decree a specific performance of a contract, although it respect lands, pro-

vided it is discovered that there are reasonable doubts, as to the validity of the vendor's title; but will leave the vendor to seek his remedy at law. But if the title is probably good, chancery will decree: for a decree of that court does not alter the title. 2 P. Wms., 199; 2 Atk., 19, 20. As chancery grants specific relief, at their discretion; that is, in the exercise of sound discretion; they do not deem it proper, where there is a reasonable doubt, whether the applicant is entitled to any remedy, to grant the peculiar remedy of that court.

It has been observed, that, ordinarily, chancery does not decree a specific performance of contracts, respecting personal property. The only reason is, that a remedy at law is deemed an adequate remedy: but if a case arises, where, in the opinion of the court a remedy at law is not considered as adequate, it is no objection to specific relief, that the contract respects personal property. Therefore, in England, contracts for transferring stock, were, formerly, considered of such magnitude, as to call for the special interference of chancery. 1 P. Wms., 571; 2 *ibid.*, 385; Pow. Con., 217, 236; 2 Vern., 39. But latterly, the courts of chancery have considered such contracts as receiving, for a breach of them, an ample remedy in courts of law; and, therefore, refuse to decree that they shall be specifically performed.

Courts of chancery have often refused to carry into execution an agreement, which they would not rescind: As when an agreement is made, unattended with fraud, but, on the whole is a hard bargain. So, when the person seeking a specific performance, has before shown a disinclination to fulfill it; but circumstances being changed (and, perhaps, by his conduct), during his delay, rendering * it now, in his view, a beneficial agreement [*402] to him. So, too, when an agreement has, for a long time, lain dormant, chancery has refused to decree the performance of such contracts. The principle, on which the denial is founded, in the last case, is, as I apprehend, that a presumption arises, that the claim made under such an agreement, has, probably been settled, or in some way released; and, therefore, the claimant is left to assert his claim at law. 2 Pow. Con., 260. A court of chancery will protect the assignment of a bond, or instrument, not negotiable; that is to say, A gives a bond to B, who sells it

to C; and of this, A has notice. If A, after notice, pay this bond to B, who is a bankrupt, so that C cannot have an effectual remedy against B, chancery will compel A to pay the contents of the bond to C. The principle on which chancery proceeds, is, that it has become the duty of the obligor to pay the assignee of the obligee; and if he violate this duty, so that the assignee is injured, chancery will compel him to compensate the assignee. If the inquiry be made, What necessity was there for the interference of chancery? Could not a court of law have afforded a remedy to the assignee? To this I answer, that I have no doubt the maxims of the common law would have reached this case; for, when an injury is sustained, because a duty was not performed, which the person who occasioned the injury, owed to the person suffering the injury, the sufferer is entitled to damages. In this case, nothing can be more manifest, than that it was the duty of A, to have paid the money due upon the bond to C, and not to have suffered the money to have gone into the hands of B; and he ought not to have taken a release from the bond, and prevented a recovery thereon; thus wantonly, without any justifiable cause, destroying C's security for his money: or if it were done to derive some advantage to himself, at the expense of C, I can conceive * of no reason why a person so injured, must apply to chancery for relief, except this, that courts of law refused to grant that relief, which the maxims of the common law would have warranted them in doing. The courts of chancery, when they grant relief in such cases, overleap no bounds and are governed by no caprice. They only afford a remedy, where, upon principles of law, there ought to be a remedy, and which courts of law refuse to grant. The unyielding disposition so long shown in Westminster Hall, against extending the maxims of the common law to cases within the reason and principles of those maxims, is, however, now yielding to more liberal views. I very much doubt whether, when such an equitable right has been violated, a court of law would now deny a remedy, in an action, appropriate to the injury. In Connecticut, an action at law, in such cases, has long since been sanctioned, without experiencing any inconvenience. It is not long since, that, if a written security for money were lost, the

loser had no remedy at law. It was supposed to be necessary to apply to chancery; and the only reason must have been, that courts of law refused to afford any remedy: for it had been established, that, when a deed or writing was lost, the contents might be proved by parol testimony, being the best evidence which the nature of the case would admit of. If A should claim title to land on an ejectment, if the deed were lost, he could prove the loss, and then prove the contents, and show his title: yet, if he wished to bring an action founded on a written instrument, he must apply to chancery. Why should it be necessary, when the evidence of the loss was, in point of law, admissible? The only reason was, because a technical rule of pleading required, that profert should be made of the instrument on which the action was brought. The defendant, then, had a right to pray oyer of the instrument, and to give oyer of it became * impossible, by reason of the loss. The plaintiff, of course, was [*404] nonsuited. The plaintiff must then be remediless, unless he applied to chancery; where he found that relief, which he ought to have found in a court of law; not in violation of any principle, but in perfect conformity to principles which had been long established: and, of late, courts of law find no difficulty in sustaining an action, where the writing is lost. In this, as in other cases, when the loss is supposed to be occasioned by the conduct of the defendant, and the knowledge of this loss is confined to him; it lays a foundation to go into chancery, to apply to the conscience of the defendant.

Where there are joint obligors, whose duty it is, each to pay an equal share of a bond, and one pays the whole, his only remedy is to apply to chancery, to obtain from him or them, his or their proportional share. Surely, the principles of law would have warranted a court of law, in affording an ample remedy. It was the duty of the joint obligors, to pay equal shares. If one performs the duty for all, in a case where he was obliged to pay the whole, if they do not, to prevent being sued: justice dictates that the rest pay to him their shares. The money paid, was money laid out and expended for their use, under circumstances that, in justice, they become liable to pay to him, the money so paid and expended; and, in consideration of such liability in

point of law, promised to pay it. No reason can be assigned for an application in equity, other than this; that courts of law refused to sustain an action on this implied contract. In Connecticut, an *indebitatus assumpsit* lies against each delinquent obligor, to recover the share which he ought to have paid. I have never heard of any inconvenience arising from such practice.

When one of two partners in trade dies, the partnership being indebted, the suit at law is brought against the *surviving [*406] partner, without joining the executor of the deceased partner. If the surviving partner should be insolvent, so that no effectual recovery could be had by means of the suit against him, the creditor then applies to chancery, that he may recover his debt from the executor of the deceased partner, who has assets sufficient. In such case, nothing can be more certain, than the liability of the executor of the deceased partner, having assets; for the deceased partner owed the debts; and his death does not discharge his estate from being liable to pay his debts; and the only reason why his executor was not in the first place joined with the survivor, in the suit against the survivor, was the inconvenience which would arise, from uniting the surviving partner with the executor of the deceased partner, when the form of the judgment against one, would be different from the form of the judgment against the other. But the inquiry is, how came it to pass, that the application, in such case, must be in chancery? Most assuredly, the facts which in such case exist, create an obligation on the executor of the deceased partner, to pay the debt: no specific remedy is sought for; a sum of money is the object of the suit; there is not any testimony wanted, that cannot be produced in a court of law. What, then, prevents bringing an action on such case, before a court of law, and there recovering? The maxims of the common law are sufficient to warrant a suit at law. The only reason is, that a court of law would not, in this case, apply the maxims of the law. There is nothing done in a court of chancery, when in such case they grant relief, that is contrary to law, but in conformity to it; and the only reason of the difference, apparent betwixt a court of law, and a court of chancery, is, not that the latter has overleaped any boundary fixed by law; but because courts of law

stopped short in affording a remedy at law, where the * maxims of the law would have warranted them in so [*406] doing. In Connecticut, we now bring a suit at law, in such case, against the executor; and have never experienced any disadvantage from such practice, that has come to my knowledge.

When chancery interposes, to compel the performance of an act which has been covenanted to be performed, it always treats the subject as if the act had been performed at the time of the contract. The act which chancery decrees to be done is the same act as would have existed had it been done when it was agreed to be done. This is the general rule; and it would seem that this was the only point of light in which it could be viewed. It would seem strange, that if A had covenanted with B to convey to him, B, an estate for life, that chancery should direct him to convey a fee simple, or *vice versa*. Yet there is a class of cases in which, if the thing had been done as covenanted to be done, it would have been a different thing from what it is when chancery decrees an execution of the covenant. If A should devise or convey Blackacre, for life, to B, and, after his death, to his heirs, or to the heirs of his body; in the former case, it would be an estate in fee simple, in B; and, in the last case, it would be a fee tail general, in B. But if A had covenanted so to do, and application was made in chancery to decree that such covenant should be executed, chancery would direct, in the first case, that the whole estate should be settled on B for life, and a fee simple to that person or persons who might happen to be the heir or heirs of B; and, in the other case, chancery would direct the estate to be settled an estate for life on B, and in strict settlement in tail on the heirs of his body, in their order; first, second, third son, &c. If A had granted or devised, in the words in which he covenanted to grant in the first case, B would have taken the* whole estate in fee simple: the words "for [*407] life" would signify nothing; and the presumptive heirs of B would not be entitled to any estate therein: B, the first taker, takes the whole. In the second case, the words "for life" signify nothing; the heirs of B's body would take an entailed estate by descent, if B did not dock the entailment; which he might do, for it was an entailed estate in him. That which,

when done, amounts to a fee simple, or fee tail, when covenanted to be done amounts to an estate for life only. That which, when done, gives no estate to the heirs of B, when covenanted to be done is a covenant to give the heirs of B a fee simple. That which, when done, may, if not docked, descend an entailed estate to B's children, when covenanted to be done is a covenant to vest in B's children a fee tail, not descendible from B, or liable to be docked. If the technical language, "for life, and his heirs," control the intention in a grant, surely there is the same reason for controlling the intention in a covenant; or, on the other hand, if the intention is to prevail, when that intention is to do a lawful act, and to control the technical language used in a covenant, there is the same reason why the intention should control the technical language in a deed or will. *Shelly's case*; *Coke's Rep.*; *Perrin v. Blake*, 4 Burr.

In the case above stated, it is apparent that a court of chancery decrees a specific performance of a covenant to do, on principles directly opposed to the principles of a court of law, respecting the same thing, when done.

The protection afforded to married women, by courts of chancery, is exclusively the province of chancery. In cases of this kind, it must be admitted that the maxim of law, that husband and wife are one person, is in a great degree disregarded. For it is now admitted that chancery will protect the separate property of the wife; and, * whenever such property is in the hands of trustees, they are compellable to allow her the whole benefit of it. Chancery acknowledges, and gives effect to her right of conveyance of such property, by deed or by will; and the husband is treated as a mere stranger to such property; and if the husband should invade such property, she has in chancery a remedy. The contracts of the husband with the wife, respecting such property, have been held valid: as where the husband has borrowed of the wife such property; the absurdity of a man's borrowing of himself being of no force, in such a case, in chancery. Often, the wife has been enabled to procure separate property for herself, from her husband's estate, by virtue of his consent; though no promise to enable her so to do has been binding upon him. A contract between husband and wife,

by articles of agreement, to live separately, is a valid contract in chancery; and it is not in the power of either husband or wife to set it aside, without the other's consent. There are jarring decisions with respect to contracts allowing a separate maintenance. The cases of *Head v. Head*, 3 Atk., 295; and *Guth v. Guth*, 3 Bro. in Can., 614, are in favor of such contracts; and *Legard v. Johnson* is opposed to them. But whatever objection may be made where the husband and wife are the only contracting parties, yet, when a trustee intervenes, chancery compels the husband to execute the contract. 2 Atk., 511. And in the last case, the power exercised is in conformity to legal principles; for such a contract has been held valid in an action at law. 2 East., 288. Chancery will not enforce such contracts at the expense of creditors or purchasers.

The validating a contract betwixt husband and wife, where there is a trustee, is, essentially, validating a contract between husband and wife where there is no trustee. The objection on account of there being no trustee is "merely formal; for, [*409] in such a case, the trustees are only agents of the husband and wife, to carry into execution their contracts. If a contract between husband and wife be what the law would not admit of, such a shift, by interposing a trustee, would be a fraud upon the law, and what the law would not endure. There does not appear any solid reason why a husband cannot convey directly to his wife any property which she is capable of holding, which would be a valid conveyance at law as well as in equity. If this be so, it is not an unauthorized assumption of power, by the courts of chancery, to decree the fulfillment of a contract of the husband, so to convey. I know it is said that A, the husband, cannot convey to B, the wife, by deed; but it is admitted that A, the husband, can convey real property to J. S., under an agreement that he shall convey to B, the wife; and an estate, so conveyed, vests in B; J. S. being the channel through which the property is conveyed to her. If the law intended to prevent the husband from conveying to his wife, would it suffer such a palpable fraud to be committed upon itself? Surely not. No principle is violated by the courts of chancery, when they view such contracts

between the husband and wife as valid. Nothing but a formal, technical, unmeaning maxim is disregarded.

Marriage agreements, before marriage, will be enforced in chancery, after marriage; that is, such as are agreed to be performed. When they are actually performed, the property is vested at law as a jointure.

A bond, given to the intended wife, to secure a marriage settlement, it is said, is considered void at law; yet chancery views this bond, with a condition to make a settlement, as a covenant so to do; and, like all other agreements to make a marriage settlement, will be *enforced in chancery. Is not this the [*410] true point of light in which to view every bond with a condition? If the thing specified is not done, the bond is in force. Is it, in substance, anything more than a covenant to do ~~that~~ thing? and, if he did not, to pay the penal part of the bond? And the penalty was affixed, for the very purpose of enforcing the thing to be done, mentioned in the condition. 2 Vern., 480; 1 Pow. Con., 444; 2 *ibid.*, 251; 1 Fondb., 137; 2 P. Wms., 243; 2 Atk., 97; 2 Pow. Con., 17; 2 Vern., 157. When such bond is entered into before marriage, to pay a certain sum to his wife after his death, such bond is considered to be an agreement which chancery will enforce. If the bond was, that some collateral act, as a conveyance by him of real property, should be done, it is easy to see why chancery should decree that the specific thing should be done; for the penalty was added to compel the performance. But, if it be to pay a sum of money, it is now settled that such bond is good at law. There have been three decisions on this point: the two first by a divided court; in the last, the court was unanimous. Since the controversy is settled, there is not any necessity of an application to chancery; for the remedy at law is adequate. 2 Vern., 480, 587; 2 P. Wms., 243; 3 *ibid.*, 334.

A court of chancery may decree the performance of an award in many cases. When it is an award to pay a sum of money, there is no reason why chancery should interpose; for the remedy at law is adequate. But when the award is to do a collateral act, and that act, if there had been a contract to do it, is such a one as chancery would decree should be done, chancery

will decree a specific performance of the award : As if the award had been to convey an authentic title to land, or if it had been to deliver a deed to the obligor, or the like, chancery would decree that it should be done. This * interference has [*411] taken place, where the award was defective ; so that no action at law could have been maintained on the award. But, in such cases, the interference of chancery was upon the ground, that there had been an agreement to perform it, subsequent to the award. 3 P. W., 187 ; 2 Vern., 24. It was decreed to be fulfilled, because the defendant had agreed to fulfill it. It is not a matter of course, that chancery will decree the performance of every agreement respecting real property : it may be such an agreement, that a recompense at law may be considered as adequate. It has been a question, whether a covenant by lessee, will be specifically enforced ? 1 Ves. ; and it is settled, that a covenant to repair, will not be enforced. Whatever the contract may be, which chancery refuses to enforce, respecting real property, if it be a perfectly fair contract, it is because a recompense in damages by a court of law, is sufficient. So, too, an agreement may relate to personal property, and be considered of such importance, that chancery will decree specific performance of it, notwithstanding the general rule : As in a case, 3 Atk., 38, which was an agreement for a purchase of a large quantity of timber, to be paid for at six installments. The purchaser was to have eight years for the disposal of the timber. A court of chancery viewed this contract of sufficient importance to warrant their interference. So, in a case of an agreement betwixt partners, to carry on a trade together, the memorandum of the agreement specified, that articles pursuant to it should be entered into. This was decreed to be fulfilled. 3 Atk., 38. So, too, a court of chancery decrees the specific performance of a covenant of indemnity. If the covenant be broken, and he who became surety had been sued, why should chancery interfere ? for chancery could render no other remedy than what a court of law could render, viz., an indemnity, by a sum of money. The * principle, in [*412] such case, is, that it is unreasonable, that the surety should be obliged to pay that money, which it was the duty of the principal to pay. The object of the application is, to compel the

principal to pay, that the surety may be saved from all trouble respecting it. On the same ground it is, where there is a counter bond, although the surety is not molested; yet, after the money has become due on the original bond, the court will decree that the principal shall discharge the debt. So, too, when the lessee had covenanted to leave on the premises, stock to a certain amount, the lessor, (the lease being about to expire,) having a well grounded suspicion that the lessee was about to leave the premises, destitute of stock, filed a bill, *quia timet*, and the court decreed a specific fulfillment of the contract.

My object, in stating these cases, is not to exhibit to view the law of contracts, or the several cases in which equity interferes; but only to furnish so many examples, as will exhibit the principle on which a court of chancery proceeds. In the cases mentioned, it is apparent, that there was a remedy at law; but chancery deemed them of sufficient magnitude to grant a specific remedy. I know it has been contended, that, in the last case equity affords a remedy, when law could not have afforded any remedy; because, it is said, that a surety cannot maintain an action at law, until he is damnified; that mere liability affords no ground for an action. There is not any necessity to examine that question in the present case; yet, I apprehend, independent of any aid from that quarter, it will be found that there is a remedy at law. The course of the business is this: There is a bond given by A, the principal, and B, the surety, to C, the creditor of A, to pay him, C, a sum of money, to be paid, as appears by the condition, at some future period; and A, the principal, executes a bond to B, the condition of which bond, is, if he, A, [*418] * should pay the original bond to C, that, in that case, the bond from A to B should be void; but if he did not so pay, the bond from A to B should be in full force. The original bond by A, as he had bound himself to do his bond to B was forfeited; and, of course, he was liable on his bond to B.

There is a great contrariety of opinion, among eminent judges, whether chancery ought to decree the performance of an agreement, where the covenantor covenanted to procure his wife to levy a fine with him, of his lands, or her own. The objection to enforce it, cannot be that such a covenant is void, by reason

of the impossibility of performing it. If there should be an impossibility to perform it, because his wife would not be persuaded to levy it, this is not that kind of impossibility, which renders the covenant void; that is to say, an impossibility in the nature of things. It must be admitted, that the contract was such, that it might be attended with peculiar hardship. The husband might not be able to persuade his wife to join with him in levying the fine; and if he could, it is highly probable, that, in many cases, it would not be a voluntary act. She does it merely to prevent the ruin of her husband. It is in some degree, invading the security which the laws afford to the wife, that she should never be obliged to part with her estate, or any right which she has in her husband's estate, without her free consent. For these reasons, it has been contended, that chancery ought, in the exercise of its discretion, to refuse to decree the performance of such contract, and to leave the plaintiff to avail himself of his remedy at law. Upon examination of the authorities, it appears, that most of them consider it such a contract, that a court, in the exercise of sound discretion, could not refuse a decree to execute it. It is said, that there is a variety of cases, where equity will decree a specific * performance of contracts, which are not recognized as good contracts in law. If there be [*414] any such, I apprehend they are fewer in number than is generally supposed. It was once supposed, that no action could be maintained, when the assignment of a chose in action, was the meritorious cause. The right obtained by such assignment, is such a right as equity will protect; and I believe the violation of such a right would now be considered such an injury as would meet with a remedy in a court of law. So, too, it is said, that an agreement betwixt two persons to divide betwixt them, what should be given to them by the will of a person, will be enforced in equity; whilst there is no remedy at law. That it should be considered such an agreement as chancery would decree the execution of, is not strange; but I cannot perceive the least reason, when such a contract is violated, why there should be no remedy at law. I know it is said, that a mere possibility does not pass by grant. The sound sense of this maxim is not very apparent; and the time has been, when a possibility was not devisable.

But this difficulty has ceased; and why it should not be grantable, when it is devisable, is very difficult to comprehend. But admit the maxim in its full strength—does this prevent a recovery on an executory contract, which respects a contingency, when it has fallen? Would not a contract be valid, where A promised B to pay to him one hundred dollars, when he should marry C? This was uncertain, and depended on a contingency: but when B marries C, he, undoubtedly, has a right of action against A, if he does not fulfill his promise.

A contract to leave a certain sum to a person in a will, if made upon a valuable consideration, it is said, will be executed in chancery, though there is no remedy at law. I perceive no difficulty which should prevent a court of law from sustaining an action [*415] on such contract. The * objection is, that the person contracting must be dead by the supposition, before any right of action arises. If this were a solid ground on which to stand, it would as effectually prevent the interference of a court of chancery, as a court of law. Whatever might have been the opinion of judges on this point, in former times, it is now admitted, that the executor may be liable at law, on a contract made by his testator, where the testator could not be liable during his life. This is the case, when A gives to B, his intended wife, a bond, that he will leave to her a legacy, of a certain amount. He marries B, and dies before her. In this case, he could not be liable on his bond, in his lifetime. But it is now no longer a controverted question, whether his executor is liable on this bond: it is settled that he is liable. So, too, if A, a testator, devise his estate, and is about to charge this estate, so devised, with a legacy, to C, and B promises the testator, that, if he will omit to charge the estate, with a legacy, to C, he, the devisee, will pay the amount of the legacy, or make some other provision for C, which he specifies; with which the testator is satisfied, and omits to charge the estate with the legacy: in this case, although there is no remedy at law, yet chancery will decree a performance of the contract. But this is no longer a difficulty, which prevents a court of law from affording a remedy, even when the devisee himself is the executor of the will of the testator; in which case it would be absurd for the executor to sue himself. The law, therefore,

to prevent a failure of justice, considers the promise to the testator, for the benefit of C, the *cestui que trust*, as a promise to C; and an action brought in the name of C, on this promise, will entitle him to recover. I believe this doctrine has never been questioned, since the case of Dutton and Pool, in Ventris. I know there is something said respecting the *cestui que trust* being a relative * to the promisee; and that this relation drew the promise to the *cestui que trust*. This is figurative language, without any meaning. The truth is, it was thought reasonable, that, rather than justice should fail, such promise being made for the benefit of the *cestui que trust*, should be considered as made to him. [*416]

Chancery, also, has a power of ordering a person to resign the evidence of debts which have been paid, and have not been given up to the obligor, or canceled; and, also, to resign the evidence of title, when it becomes improper to hold it; as in case, when the debt secured by it was paid, on the day on which it was contracted to be paid. 9 Mod., 297; 2 Atk., 307; 1 Vern., 479. In these cases, it is true, if the defendant was sued by the mortgagee, in a suit at law, for the purpose of ejecting him, he might defeat a recovery by the same evidence, as, when he is plaintiff in chancery, he can compel a surrender of the evidence, by force of which the claim was made; but it is uncertain when such suit will be brought. It may be delayed until all the witnesses to the necessary fact of payment of the demand, are dead. This is enough to warrant chancery to grant specific relief. If it be said, that the plaintiff, in such case, has a right to instruments which he claims, and that the defendant would be liable at law in an action; all this may be true; but damages recovered in a suit at law, would not afford that specific relief, which he seeks in chancery, and to which he is entitled.

[*417]

*CHAPTER II.

OF THE PRINCIPLES WHICH GOVERN IN RESCINDING AND MODIFYING
CONTRACTS ; AND WHEN A COURT OF CHANCERY WILL RESCIND
OR MODIFY CONTRACTS.

I HAVE considered the power of chancery in granting specific relief ; and have endeavored to point out the governing principle in each case. I shall now consider the power which they exercise, either in rescinding contracts altogether, or in part ; and so moulding them, as to effectuate between the parties, the most substantial justice. They, in this case, resort often to the power they have of appealing to the conscience of the litigant parties in chancery : and, in no case, do courts of chancery give vindictive damages. Whenever they relieve, by rescinding or modifying a contract, they compel the person, in whose favor they decide, to do complete justice.

There are two classes of cases, in which this power is exercised. One of them is where no recovery could be had on the contract. If a suit were instituted upon it, the defendant would avoid it. The other is, where a recovery might be had. The ground on which chancery proceeds, in such cases, where a court of law will afford a remedy, is, that the evidence by which such contracts may be defeated, may be lost. Almost every case rests on parol testimony. The witnesses may die before a suit is brought ; and it may be the case that the covenantee, obligee, or promisee, would abstain from instituting a suit, until the witnesses are dead, or gone out of *the reach of the defendant. In such case, there would not be any necessity to apply to chancery, provided the defendant had an opportunity to defend against the plaintiff's suit. There is another class of cases, which cases, in the opinion of a court of chancery, are radically corrupt ; which they, therefore, rescind : but the courts of law suffer the plaintiffs to recover thereon. In those cases, it is apparent, that the difference betwixt the courts does not con-

rest in a difference in principle; for it is as much a maxim of law, that an illegal contract is void, as it is in equity. But chancery views certain contracts unlawful, which a court of law does not. So, too, it is as much a maxim of law as equity, that contracts, obtained by fear, occasioned by improper conduct, to which a person would not have consented, if left to act freely, are void; as it is of equity. But the courts of law have stopped short in the application of the maxim; whilst chancery has extended the maxim to a variety of cases, which, as they suppose, fall within the reason of the maxim. Courts of law and chancery agree in principle; but differ in the application of the principle; and this difference has extended the jurisdiction of chancery to a vast number of cases, which a court of law is as competent to decide upon as a court of chancery. If the maxims of the common law warrant a court of chancery to rescind them, because they ought to be considered of no validity; then is a court of law also justified in treating them as destitute of any validity. On the other hand, if these maxims do not warrant a court of law to treat them as if they were not valid; neither do they warrant a court of chancery to treat them as not valid.

A court of chancery will rescind, or relieve against contracts opposed to sound policy. Such will be rescinded utterly, or relieved against, so far as they are opposed to sound policy; and will often be so modified, as *to effectuate substantial [*419] justice between the parties. It is a maxim of law, that contracts against sound policy, are void; and many such are so treated in a court of law; As if a man should contract not to carry on his honest business; as where a mechanic contracts not to follow his trade, or a merchant his merchandise, and many others; on which contracts there can be no recovery for a violation of them. But the courts of law have stopped short, and have not applied it to contracts, which courts of chancery judge to be within the rule, and which they will rescind, or relieve against. One of these cases, is marriage brocage contracts. These are, in equity, considered to be opposed to sound policy, and with the highest reason; for money, paid for the purpose of engaging persons to procure a match, may often be the means

of bringing about an unhappy marriage connexion, which will disappoint the expectations of parents, and inflict painful and lasting wounds on their peace of mind, and result in the entire destruction of domestic tranquillity. Such contracts, though hitherto considered as valid in law, will be rescinded in chancery.

Contracts for the sale of expectancies of young heirs are, in chancery, held to be radically corrupt; and chancery will rescind them, on the repayment of the money received. Surely, such contracts are against sound policy which are so often the means of feeding the licentious passions of men. Headstrong young men are, by this means, furnished with money, which enables them to pursue their demoralizing pleasures. Their talents are, also, withdrawn from all useful employments; and they often become a burden to others. By this means, prodigality is encouraged; the expectations of parents, and other friends, are disappointed. Whilst they suppose that the property which they leave will contribute to the comfort of the objects of their affection, it is devoured by the * sharper and the miser. There [*420] does not seem to be any reason why courts of law should not have extended their principles to embrace cases of this kind. 8 P. Wms., 131; 2 Vern., 346; 2 Atk., 34; 1 *ibid.*, 354. In the same point of light, I apprehend, chancery has viewed mortgages, as opposed to sound policy; and have assumed a jurisdiction over them, because they were so opposed; and, as far as they are opposed to sound policy, chancery relieves against them. The contract betwixt the parties, as to the effect of it, is justly considered in a court of law. If such contract is to be viewed as a valid contract, the intention of the parties, as expressed in the contract, ought to be regarded. When A agrees, expressly under his hand and seal, that, if he do not pay to B one thousand dollars, by such a day, that the deed which he has given to B shall be an absolute deed, how is it possible for a court of equity to treat this subject differently from a court of law, as it now does? It would not be expounding the meaning of a contract; but making a contract for the parties. As to the meaning of a contract, nothing can be more explicit than the terms used by the parties. Every person will understand the meaning to be exactly as it is understood by a court of law. But it was easy

to see that, if full effect were given to such contracts, as is done in courts of law, great injustice would be done; and that sound policy did indeed require that such contracts should not be suffered to have their full effect. Chancery was thus warranted, by the well-known maxim that contracts opposed to sound policy are void, so to modify the contract by mortgage as to prevent that injustice which rendered it void, as being opposed to sound policy. There was no defect in the contract, so far as it was a contract which conveyed land to secure a debt: this was reasonable and proper. But that part of the contract which provided that, if the debt were not paid by such a * time, the land mortgaged should be forfeited (however great the [*421] disparity might be betwixt the value of the land and the value of the debt), is opposed to sound policy. Therefore, it was proper for a court of chancery to restrain its operation, and not suffer it to extend any further than to be a security for the debt due from the mortgagor; at the same time permitting the mortgagee to use his title for the purpose of procuring payment of his demand. Therefore it is, if the mortgagor come into chancery for a decree of redemption, chancery will grant its aid on no other condition than the payment of the debt due. If the mortgagor does not come to redeem, chancery never interrupts the mortgagee in using his title, as sole owner of the land, to get possession of the land, and to reimburse himself his debt. If he take enough to reimburse him, chancery will decree a redemption, without decreeing anything to be paid; for he has the full benefit of the legal part of the contract: his debt is realized. So, too, on the same ground, chancery compels the mortgagee to account for the rents and profits of the land whilst in his possession; that is, the rents must be applied to the payment of interest in the first place, and then to the principal. So, too, if the security be ample, chancery will issue an injunction against the mortgagee in possession, that he shall not commit waste. But if he cannot get his debt from the rents and profits of the mortgaged premises, there being a defective security for the debt, chancery will not prevent him from committing waste; but he must account with the mortgagor for the profits. Chancery considers the mortgagee entitled to nothing but his debt, and the mortgaged

premises as a security for the debt, as well after the forfeiture as before.

Upon the same principle it is that chancery has always decreed [*422] a redemption, upon payment of principal and *simple interest, although the contract was to pay compound interest. It has been said that chancery so decrees, because a contract to pay compound interest is oppressive. But, surely, there can be no injustice in such a contract, as it respects the parties; for the payment of compound interest is in perfect accordance with the most perfect justice; for interest is an annual sum; it is a certain sum, allowed to be taken for the use of money, for a year. If A lend to B one hundred dollars, and, at the end of the year, receives the lawful interest, this he has a right to receive; and he may, without any breach of the purest equity, lend the money so received to the payer, or any other man, on interest: such a transaction would be good at law and in equity. And if, in such a course of proceeding, say for ten years, the borrower should pay annually the interest, and the interest should be loaned, and the interest of this loan should be paid annually, the lender, in that case, will then have received the same sum, and no more, than if, at the end of ten years, nothing having been paid, the creditor should demand from him compound interest; and yet, in the last case, he could not receive it. The principle must be, that, to admit a recovery, would be opposed to sound policy; for inconsiderate men do not calculate how fast compound interest accumulates a debt against them, which will unexpectedly sweep their property from under their feet. And although there is no injustice in receiving interest annually (nay, it is in perfect unison with the spirit of the law that admits interest to be taken), if the debtor pay annually such interest, the law admits it to be done; or, if the creditor insists upon his interest annually, he can compel payment, and thus get his interest upon interest. But so many men are inconsiderate as to the consequence of suffering their debts to accumulate interest, when they are not called upon yearly, that it has been deemed [*423] *dangerous to suffer the recovery of compound interest; and, in this respect, the law accords with chancery. In neither court can compound interest be recovered; and in neither

would a contract be in force to secure it, any further than thereby to recover the principal and simple interest. We are here furnished with a case where the contract of the parties is disregarded, both in law and equity, as far as such contract is opposed to sound policy; and full effect is given to it, as far as is consistent with sound policy. On the same principle, chancery interposes to relieve against penalties. A contract to which a penalty is annexed, so far as it respects the enforcing of the penalty, is holden, in equity, to be against sound policy, and of a very dangerous tendency. On what other ground could a contract, to which a penalty is annexed, be disregarded, as far as it respects the penalty? For the contract is express that, if such a thing is not done, the agreement to pay the penalty shall be binding; but chancery says, such contract shall not be binding. Courts of law would not apply the well-known maxim to the case of penalties, but suffered them to be recovered: this drove the parties into chancery, and they granted them relief, and that in direct violation of the contract. This was a monstrous stretch of arbitrary power, if such contract was valid. But it was no more than perfect justice, if the contract were invalid, so far as it respected the penalty. Chancery so moulds the contract as to give effect to it, so far as it is consistent with policy.

To prevent the necessity of applying to chancery, a statute has been enacted, which, although it does not reach every case, yet it does many; by means whereof courts of law are vested with power to chancery down the penalty to a sum which it is equitable that the plaintiff should recover. The legislature could not have done this, if the contract had been valid.

* It is not every case where a person agrees to do a certain thing, or to pay a sum of money, that chancery will [*424] relieve against as a penalty: it may be an agreement on a sum in damages to be paid, if the thing is not done; leaving the party contracting to his election to do which he pleases. But whenever the sum to be forfeited is annexed, for the purpose of securing the performance of the agreement, it is a penalty, against which chancery will relieve, unless the penalty is for so small a sum that it cannot be supposed worthy of the interposition of chancery.

Chancery will relieve against a bargain, where there has been no fraud, but where both parties have been mistaken. The seller supposed that he was selling a different thing from what he sold; and the buyer bought a different thing from that which he supposed he had bought; that is to say, when the mistake respected something, the supposed existence of which was the cause of the bargain: As if A should purchase of B a tract of land, on which both supposed there was a mine of lead; and the object of the purchase was, to buy a mine of lead; and had it not been for this belief, A would not have purchased the tract of land. It was the *sine qua non* of his purchase, that there should be a mine of lead on the land purchased; and B honestly sold the land, believing that he sold a mine of lead. But, upon a more accurate mensuration, it was found, that the mine was on the land of C. It is not difficult to see, that such a contract ought not to be binding; when neither party intended to enter into such a contract. To use a common expression, which contains a sound maxim of law, the minds of the parties did not meet on such a contract; therefore it was not binding. It would never have been supposed to be binding, at law, any more than in equity; if courts of law would have applied an acknowledged [*425] * maxim of law to it, and held it to have been void. By this, it is not meant to assert, that the buyer has no remedy; and that he may not recover a compensation at law, in damages: but the remedy there, is defective; for by such recovery, the contract is confirmed; and the purchaser is obliged to keep the thing purchased, at its worth in market, which he never intended to have purchased; and which would be of very little, or no value to him: whereas the maxim would justify any court in considering the contract as void. So, too, in conformity to the same maxim, when a person has entered into a contract, under a misapprehension of his rights; chancery has relieved against such contract. Nothing can be stronger on this point, than the declarations of the chancellor, in a case, where a man, being caught in bed with the wife of another man, was, for fear of losing his life, compelled, by duress, to execute to the husband a bond for a large sum of money; and afterwards, when the duress was removed, affirmed the old contract, by giving a new

bond. On a bill filed for relief against this new bond, the chancellor said, that if it had appeared, that when the new bond was executed, the obligor had supposed that he was bound, in point of law, to pay the first bond, he would have relieved against the new bond: notwithstanding, it seems to be an opinion commonly received, that a man cannot avail himself of his ignorance of the law, to obtain relief. It will be found, that the maxim *ignorantia legis non excusat*, is very far from being of universal application, in matters of civil concern. As in the case where there were three brothers, A, B, and C: B, the middle brother, died, seised in fee simple of real property: not having devised it by will. A, the elder, and C, the younger brother, both claimed the estate. That they might amicably settle their controversy, they agreed to * consult D, a school-master, who lived in the neighborhood; and who, they supposed, was learned [426] in the law. D informed them, that there was a maxim of law, *terra ponderosa est*; and, of course, was of opinion, that the estate had gone downwards to C: but as it was equitable that they should divide it, he advised them so to do. Accordingly, by deed, they divided the estate betwixt them. The elder brother having found out, that by law, all the real estate of his deceased brother belonged to him, and that he, from a misapprehension of his rights, through ignorance of the law, had parted with his property, applied to chancery for relief; and the conveyances were set aside, in favor of the elder brother: and this was done in a case where no special equity required it. When a mistake respecting any fact, is not such as would, if the fact had been discovered, have prevented the bargain, chancery will not set aside the contract, although the mistake may have occasioned the giving something more than would have been given, if the fact had been known at the time when the contract was entered into: for in such case, a compensation in damages would be a sufficient remedy.

Certainly a court of law is not a stranger to affording an effectual remedy, in cases of mistake. An action at law has been sustained, demanding compensation for an injury arising from a mistake in settling an account. So, too, an action for money had and received, where money has been paid by mistake, is a com-

plete remedy for the injury accruing by mistake. There are many cases where a contract obtained by force is not valid; because the mind of the promisor was not voluntary in the promise. For the same reason, a contract where a mistake has intervened, ought not to be considered as valid; for the mind of the promisor was not voluntary in the contract. The difference, [*427] in cases where mistakes have *intervened, betwixt courts of law and equity, is not in principle, (for both courts adopt the same principles,) but in the application of the principles.

Contracts obtained by such force, or putting in fear, as amounts to duress of imprisonment, or duress *per minas*, are void at law; and the reason why they are void, is, because the mind of the promisor was not voluntary in the contract: they were entered into, because the promisor, obligor, or covenantor, wished to avoid what appeared to him a greater evil than to enter into the contract: he did not act freely; and for that reason, he ought not to be bound. But courts of law will not apply the principle to any case, where the force, or fear, which produced the contract, falls short of duress; whilst chancery applies it to every case where the contract was entered into, from fear of some great evil, if he did not so contract; provided the fear is well grounded, or reasonable. Fear of some unlawful violence, although it does not amount to legal duress, is a sufficient ground, in a court of chancery, to avoid a contract. 1 P. W., 118, 689; 1 Bro. in Can., 869; 2 Pow. Con., 160, 187, 264; 3 P. W., 298. So, contracts to avoid some great evil, whether force is threatened or not, which the person who obtained the contract had no right to inflict, will be rescinded in equity, although an action cannot be sustained on such contract, in a court of law. In these cases, where equity rescinds, it is done upon the same ground; that a court of law treats a contract obtained by duress, as void. As, where a gentleman paid his addresses to a young lady of great fortune, with the connivance and approbation of the young lady's mother, who was guardian to her. When the mother found that her daughter's suitor was very much attached to her daughter, she informed him, that her daughter's fortune was very ample; and, if he received at her (the mother's) hands, the principal, without

* interest, on the rents and profits of her daughter's estate, (since it had been in her hands as guardian,) and [*428] should suffer her to retain them, as a reward for the care which she had bestowed on her daughter's education; and the expenses she had laid out in providing for her; this, in her opinion, would be reasonable. But finding that he was unwilling to agree to her proposal, she told him, that, unless he would covenant never to call her to an account for the avails of her daughter's estate, that is to say, the interest of her money, and the rents of her estate; she would use her influence to prevent the marriage of her daughter with him. The suitor, being unwilling to run any risk, not knowing what influence the mother might have over the daughter, covenanted not to demand, after marriage, any interests, rents, or profits of the daughter's estate. The marriage took place; the husband, then, applied to chancery for relief, and chancery set aside the covenant; because that which he did, was done to avoid what appeared to him to be a great evil; and what he did, was not done voluntarily, but much against his will.

So, too, when A, finding B to be embarrassed in his circumstances, and very hardly pressed for money, appeared to be very friendly to B, and loaned him money repeatedly. He then told B, that he must sell to him his real estate, for such a sum, which was very far below the real value of the estate; and threatened him, that, if he did not comply with his proposal, he would arrest him for the money due to him. B, finding himself thus enthralled, and, at that time, perceiving no means by which he could extricate himself from the evils with which he was encompassed, complied with A's proposal; and then applied to chancery to rescind the contract, which he had made to avoid the evil of being arrested and thrown into a jail. The court set aside the conveyances by B to A, * on the condition that B paid A all [*429] that which he owed him. These cases are mentioned as examples of the principle that every contract, obtained by any imposed hardship, oppression, or extortion, is not voluntarily made, and, being entered into reluctantly, is void; for such contract is made to avoid some pressing evil, and falls within the maxim, and will be set aside in chancery, upon the terms of restoring what is honestly due.

The contracts of lunatics, idiots, and persons *non compos mentis*, are void at law. Whether the lunatic can avoid such his contract, himself, by reason of a maxim, *that a man may not stultify himself*, or not, is not a subject of the present inquiry; for, whether it belongs to him, or his representative, after his decease, to avail himself of the lunacy, whenever it is done, the contract, bond, or other deed, is considered as void at law. But feebleness of intellect, which has fallen short of lunacy, of idiocy, or of constituting that character denominated *non compos mentis*, has never been considered, in a court of law, as rendering a contract void. The maxim, which is acknowledged to be the governing principle, is this: that, when there is a want of intellect in any person, there can be no contract entered into by such person, as will be binding upon him. Chancery has extended the application of this maxim beyond what has ever been done by a court of law: as, where a tutor to a young gentleman of weak understanding, procured from him a voluntary bond for one thousand pounds, chancery set it aside. It is in vain to say, that the ground on which chancery proceeded, was, that such conduct was a fraud, and breach of trust. Admitting this to be so, it does not alter the case; for that which made it a fraud in the tutor, was, the slender capacity of the young gentleman. If his understanding had not been below the common level, a court of chancery would not have interfered, to set aside a bond of a [*480] thousand pounds, given by a pupil, when the pupil was *sui juris*, and the son of a nobleman, as was the case. The weakness of the intellect was a *sine qua non* of the decree. In such case, a court of law would have sustained an action on the bond. The difference in this case, is not because the principles of law in both courts are not the same; but because a court of law refuses to apply acknowledged principles to such a case, whilst a court of chancery gives full effect to those principles which it acknowledges. A court of chancery, has, also, interfered to rescind an unreasonable contract, which has been obtained of a man when intoxicated, when that intoxication has been procured by the person who obtained the bargain. If the same bargain had been obtained without force, fear, or fraud, of a man in his right mind, it would not be set aside in chancery. The

state of mind that he was in, in consequence of intoxication, was the reason why, an unreasonable bargain was obtained of him. A court of law has not extended the maxim thus far. We find no case where a court of chancery has rescinded a contract, on the ground that the promisor was intoxicated, unless he was drawn into that state by the practice of the promisee, &c. Neither do we find any case where relief has been denied, when advantage has been taken of a man destitute of the regular exercise of his understanding, by reason of intoxication, although the bargainee had no hand in bringing him into a state of intoxication. Nothing can be more clear than this; that when a man is intoxicated, he is, in a great measure, deprived of his reason, and always of the regular exercise of it. Why, then, should a man be bound by a contract unreasonable and ruinous to him, which he entered into when destitute of his reason? If the regular exercise of intellect be necessary to give efficacy to a contract; then a contract, unreasonable in itself, entered into by a person when intoxicated, * ought to be considered as void, [*481] both at law and in equity. It would not be proper, indeed, to treat a drunken man as a person privileged to rescind his contracts, at pleasure, as an infant may. It would be sufficient to restrain his power to set aside his contracts, to those only which are unreasonable. It may be objected that our law does not permit intoxication to furnish any excuse for a man's conduct; for, if a man should do that act, which would be murder, if done by a person in possession of his right mind; it also would be murder, if committed by a person deprived of his reason by intoxication, and he will be punished as a murderer. This, indeed, is so; and yet there is no person who does not perceive that he may be as devoid of reason as a lunatic: yet all men concur in the opinion, that a lunatic ought not to be put to death in such a case, because he was destitute of reason. We shudder at the idea of putting such a man to death, who is, in our opinion, incapable of committing a crime; and yet we concur in the opinion, that when a man who is intoxicated, so conducts, although utterly destitute of reason, that he ought to be put to death. It is sometimes said, that a man brought upon himself his want of reason; and, therefore, it was occasioned by his own fault; and,

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upon that account it ought not to be any excuse for him. But this is not the reason why the lunatic is excused from punishment, and the drunken man put to death; for we will suppose that a man, by a course of intoxication, had become an idiot, or a madman, and never since had been intoxicated; and such a man had done the deed that would have been murder, if perpetrated by a man in his right mind; yet it would be no crime in this madman, and yet he was the guilty cause of his want of understanding. He would be no more considered as deserving of death, than the person who had become a madman by the visitation of God. The reason why the person * intoxicated should be treated as a murderer, is a reason of policy; for if it were not so, it would open a door for the exercise of the most diabolical malice, under the pretense of a feigned intoxication. Nay, it would lead to actual intoxication, that the most malignant passions of the human heart might be gratified with impunity. No other course could be taken, with safety to the lives of men, unless intoxication itself should be punished as a capital offense. But what has this to do with civil concerns? What policy requires that any man should derive to himself an unconscientious gain, by taking advantage of a man who is disqualified, though it be by his own act, from taking a proper care of his business? The law has not employed any man to inflict punishment on his neighbor for his intemperance; nor is it necessary that any man should make a bargain with one deprived of his reason by intemperance. The commonwealth has no interest in it: no policy requires it: and when that is the case, there is no reason that a man should be bound by a ruinous contract, who was deprived of his understanding, when he entered into it, whether it was occasioned by intoxication, or any other cause. It seems to me, that such contract, so obtained, would be void, both at law and in equity: and although it should happen, in this case, as it has in many others, that a court of law should stop short in granting the relief that the maxims of law would warrant; yet, I apprehend, that a court of chancery would set aside such contract, on the condition that the applicant repay all that he has received.

Some contracts, obtained by fraud, are utterly void at law. Others are not void: yet an action may be sustained at law, on account of the fraud practised in obtaining them, and damages will be recovered to the extent of the injury suffered. Some contracts, obtained by fraud, chancery does not relieve against, considering the remedy at * law, for damages for the fraud, an adequate remedy; whilst other contracts, so [*433] obtained, will be rescinded in chancery, on account of the fraud; or an action at law will be sustained, to recover damage for the fraud. That we may discover on what ground chancery exercises this power, it will be necessary to take some notice of the several classes of cases which have been mentioned. Before I do this, I will observe, that I shall treat this subject as if the maxim, *caveat emptor*, as it respects the purchase of land, does not apply in its full force in this country, whatever good sense there may be in the maxim itself. If A purchases a farm, in a well settled, cultivated country, where the purchaser has a fair opportunity to examine the quality of the land; the case is very different from the purchase of a large tract of land, in a wild, uncultivated country, where millions of acres are brought to market, which it is not supposed the purchaser has ever seen. If, in the latter case, the seller should falsely affirm concerning the land, that it was interval bottom land, when he knew that it was a ledge of rocks, lying on an inaccessible mountain: I entertain no doubt, that, for this fraud, an action at law ought to be maintained, as much as if a false representation had been made respecting personal property.

Contracts, obtained by a fraud, which respects the execution of the contract, are void at law. Thus, if A, by fraud, procures B to enter into a contract entirely different from that which he supposed he entered into, this would be a void contract, and treated as such in a court of law. Suppose the case to be, that B, by contract, was to execute a note to A for five dollars; and it so happens that B is blind. A draws a note for fifty dollars, and reads it to B, as being for five dollars. B, placing confidence in the integrity of A, executes the note. * This note is void at law, against which B can always, with the proof [*434] of these facts, make a good defense; so that there is no necessity

of applying to chancery, unless it is to procure a delivery of the note, for fear it may rise up against B, after the witnesses to these facts are dead.

Contracts, where the fraud is in the consideration, are not considered void at law. Neither does chancery ordinarily interfere, if the contract relates to a personal concern, but leaves the person defrauded to his remedy at law for a compensation in damages, on the ground that this is an adequate remedy. If the contract relates to real property, chancery will rescind it, on the usual terms of restoring what has been received. The maxim is, if a man enters into a contract, to which he did not voluntarily consent, he ought not to be bound by it; and, assuredly, no man ever consented to be defrauded. The force of this maxim is admitted, in its full extent, in a court of law, when the fraud is in the execution of the contract. The reason why he is not bound by it is, that he never agreed to such a contract; and why it should be considered as a binding contract, when the fraud is in the consideration, it is difficult to discover. It is true, in the first case, he supposed that he was executing one contract, whilst he was executing a different one. In the last case, he was executing just such a contract as he supposed he was executing; but he no more voluntarily agreed to this contract, being defrauded as to the consideration, than he did to the other; and chancery so considers it, and treats it as void, by rescinding it. Chancery differs not in principle, in these cases, from a court of law; but extends the principle to all cases within its reach.

I think it very questionable whether courts of law proceed upon a correct ground, when they recompense * the person [*435] defrauded, in a suit in damages. I apprehend the true ground would be, to treat the contract as void. The consequences which follow from the rule adopted show that justice is not done to the person defrauded. For instance: A, by fraudulent affirmations, sells to B a horse, and takes from him one hundred and fifty dollars as the price of the horse, which would have been a fair price if the horse had been a sound one; but he was defective, but of some value; he was worth fifty dollars as a draught-horse in a team, but of no value as a saddle-horse, for which purpose only B purchased him. B had no use for a team-horse,

or, if he had, he was supplied. B sues A for the fraud; and, on the ground that the contract was valid, and that the property of the horse vested in B, the recovery is the difference betwixt the value of the horse and the money paid, viz., one hundred dollars. And thus B is obliged to purchase a horse at the price of fifty dollars which he did not want. Suppose B did not pay the one hundred and fifty dollars, but gave his note. On the ground that the note is valid, A will recover of him the sum of one hundred and fifty dollars, and he is recompensed, in an action for the fraud, in the sum of one hundred dollars in damages and a horse such as he never intended to purchase, at the expense of two suits. Whereas, if the whole contract was considered as void, because B had never voluntarily consented to such a contract, then, in the first case, B would have nothing to do but to tender to A his horse, and then receive his one hundred and fifty dollars; and, in the last case, to tender to A his horse, and, if A should sue him on the note, to defeat the recovery by pleading *non assumpsit*, and giving the fraud in evidence, or pleading specially the fraud. In both of which cases, B would be restored to the situation he was in at the time he was defrauded, and A also. It is difficult to see why B is not entitled to * this; and why he should be burdened with property that he did [*486] not want, and for which he never meant to contract; and why A should be admitted to put off his property to B at a full price, when B had no need of it, merely because A had defrauded B. Nothing can be more reasonable than that the whole contract should be annulled, and the parties placed in the same state in which they were before any fraud had been practised. So, too, in the case where A made use of his superior skill to impose upon the ignorance of B in the contract where A sold to B a horse, and B engaged to give to A therefor as much rye as would arise by giving two kernels of rye for the first nail in the horse's shoe, and four kernels for the second, and eight kernels for the third; and thus, in this manner, to continue to double at each nail in the shoes, which amounted to thirty-six nails. On this contract A sues B for not paying the rye: the court, instead of treating this contract as void, sustained an action thereon, but did not suffer the plaintiff to recover according to the contract,

although the contract was an express one, but directed the jury to give to A the value of the horse. It is manifest that this course defeated the intention of both parties; for A never meant to sell his horse for eight pounds, which was the value set upon the horse by the verdict of the jury, neither did B expect to give eight pounds. It is not probable that he supposed the horse would cost him more than a bushel of rye. If this contract, thus obtained, by a species of fraud, had been considered as void, nothing could have been recovered; and A would have been again entitled to his horse.

In those cases where a swindler obtains property under the semblance of a contract, by false tokens, and the like, the contract is treated as void at law; and property so obtained does not, as betwixt the person defrauded* and the swindler, [*487] vest in the latter any more than if it was stolen. The original owner may, of course, maintain trespass against the swindler, as if there had never been any contract betwixt them; for the fraud blots out of existence the bailment, and places everything on the same footing as if there had never been any agreement whatever. It is plain, that the doctrine of the efficacy of fraud to vacate a contract is recognized by the courts of law in many cases; and the difference between equity and law does not consist in the principles respecting the nature of fraud, but in this: that courts of law do not apply those principles to all cases within their reach, whilst courts of chancery do apply them to all such cases, provided they are within their jurisdiction.

It has long been an established rule in chancery to rescind contracts entered into for the purpose of defrauding third persons. They have been viewed, in equity, so utterly void, that they could not be ratified by any subsequent agreement. As, where A, being about to marry B, C, the father of A, and D, the father of B, made proposals to each other respecting what they would settle upon their children. D made a proposal to C that, if he would give his son a bond for five thousand pounds, that he, D, would also give his bond to C's son for five thousand pounds. C hesitated respecting complying with the proposal of D: at length, to remove all difficulties out of the way, and to satisfy D, A, with the advice of B, entered into a secret agree-

ment with C to give him a bond of fifteen hundred pounds if he would comply with the proposals of D. This was kept a secret from D: C complied with D's proposals; the settlements were made, and A gave to C his bond for fifteen hundred pounds. After marriage, A filed his bill in chancery to be relieved against the bond which he gave to his father; not that he or his wife were imposed upon, but * because D, a third person, was imposed upon. The court decreed that the bond should be given up. If this proceeding was correct, in point of principle, in a court of chancery, it would have been correct in a court of law to have refused a recovery on such bond. But no such opinion seems to have been formerly entertained, that it was possible to relieve against such frauds, only in chancery. By a late decision in Term Reports, we find a court of law extending the remedy to such case without difficulty. Where an insolvent debtor, upon an agreement of his creditors to take his property and divide it among them equally according to their debts, and to discharge him, provided all his creditors would agree so to do, one of the creditors, taking advantage of the debtor's situation, would not come into the agreement unless the debtor would give his note of hand, for a certain sum, over and above his average with the other creditors. This was done, and kept secret from the other creditors: the agreement between the insolvent debtor and the creditors was carried into execution. After a lapse of a little time, the promisee in the notes so given by the insolvent debtor brought his suit at law upon said notes, and the debtor avoided them, by reason of the fraud; not because any fraud was practised on him, but on account of the imposition on the other creditors. So that I presume it may be laid down, that contracts entered into, by means of which third persons are imposed upon, are void at law, as well as in equity.

Under the head of fraud, chancery exercises an extensive power, in rescinding contracts which are unreasonable, where no actual fraud can be proved from misrepresentation; as where there is a concealment of facts, which, in good conscience, ought to have been disclosed. As, when A devised his estate to B, when C was his heir: the will was defective; this was known to B, but not known to C. * The devisee prevailed [*489]

upon the heir, for one hundred guineas, to release his interest in the estate. The heir, discovering the defect in the will, applied for relief; and the court set aside the release, upon the condition of the repayment of the one hundred guineas. There was, in this case, no equity in favor of the heir, only what arose from a naked, legal right; yet the concealment of this right from the heir was holden to be a fraud. 1 P. Wms., 239.

A concealment of a doubtful account of a ship at sea being in dangerous circumstances, by the insured, was such a fraud as that the policy was ordered to be delivered up. In this case, the policy would have been, by the mercantile law, void in a court of law, if a suit had been brought upon it. The application was, as might be in other cases when a contract is void, for the delivery up of the evidence of the claim. 2 P. Wms., 169. The bargain itself will prove, in some cases, that an undue advantage has been taken. This may appear from the manifest inadequacy of the price. The inequality may be so great that it is impossible not to see that the situation of promisor, obligor, covenantor, or grantor, as the case may be, was such that no man could fairly have obtained such a bargain. Whether it proves that the bargainer was deprived of his reason by the visitation of God, by intoxication, or that some actual unknown fraud was practised upon him, or, laboring under some sore oppression, he made it, is not material; for, whatever it might be, it must have been a fraud to have obtained such a bargain. 1 Bro. in Can., 9; 2 *ibid.*, 175.

It is no uncommon thing, when application is made to chancery for a discovery, by appealing to the conscience of an antagonist, to pray also for relief; and if relief is granted, it is upon the well known principles which govern in chancery, of doing [*440] perfect justice between the * parties. If A should apply to chancery, charging B with having obtained from him a usurious contract, praying for a discovery under oath, and for relief; and, upon the discovery, it appears to be usurious; chancery does not decree in such a manner that the creditor loses his whole debt; which would have been the case at law, if the usury had been pleaded and proved. But the decree in chancery operates upon nothing but the surplus of legal interest. As to this,

the applicant will be relieved, on paying the principal and legal interest: what is more than that, is viewed, in equity, as unlawful interest. If the whole contract was relieved against, this would be to inflict a penalty on the defendant; which is never done in chancery. Neither would a court of chancery, in such a case, compel a discovery merely, which, if used in a court of law, a penalty would be inflicted by the court. And, also, when an application is made to chancery for relief, and the applicant in such case is entitled, for the injury which he has received, to a penalty; he must waive his claim to the penalty, or chancery will not grant relief. Neither will chancery compel a discovery, where such discovery will subject to punishment: as in the case of usury; if the application is for the purpose of discovering whether usury is contained in a contract or security, chancery will compel a discovery; for no punishment is the consequence of reserving more than legal interest. But if a bill is filed to discover whether more than legal interest has been taken, chancery will not compel a discovery; for, receiving unlawful interest is an offense which will subject the person who is guilty of it to a severe penalty.

Formerly, when a sale was made of goods, at a most exorbitant price, to assist the buyer to raise money by a sale of the goods; (whatever may be thought of such conduct now, that is to say, whether it is usurious or not;)* the time was, when, if it was not connected with a loan of some sort, it was [*441] holden that it was not usury, and the application was in chancery: for it was deemed a fraud to take such an unrighteous advantage of the necessitous circumstances of the buyer: As where A applied to B, to borrow a sum of him; B refused to lend him any money; but offered to sell him sundry pipes of wine on credit, at the price of two hundred pounds per pipe. The market price, for cash in hand, was one hundred pounds per pipe. To this proposal A agreed; and purchased sundry pipes, and sold them at the market price, and raised the money for which he was at that time pressed. This conduct was holden in chancery to be a fraud, and the contract rescinded; and A was ordered to pay to B the sum for which the wine was sold. See a case, 1 Bro. in Can., 149, of the same kind.

Equity has often rescinded unequal bargains, on account of the relative situation of the parties. As where such bargains have been obtained by parents from their children, by guardians, from those who were recently their wards; it being deemed fraudulent, that they should avail themselves of the influence which their situation had afforded them, to obtain unreasonable bargains from them. So, too, it is holden to be a fraud, to take advantages of the necessitous situation of a person, and draw him into an unequal bargain; for which chancery will rescind a contract on the usual terms. 1 Vern., 287; Ca. Temp. Tal., 111.

A contract with sailors has been rescinded, where the consideration that they were an inexperienced, incautious race of men had great weight. 1 Wils., 229. The Chancellor observed, that there were not a more unthinking sort of people than common sailors. Their character, as sailors, was taken into consideration; [*442] and chancery exercised * this power of rescinding such contracts, on the principle, that, where there was not the utmost fairness, in the contract with such characters, it was a fraud sufficient to rescind the contract; when it would not have been sufficient, where that peculiarity of character belonging to sailors, did not exist

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*CHAPTER III.

OF THE PRINCIPLES WHICH GOVERN IN DECREERING THE FULFILLMENT OF A TRUST.

A PERSON who is trustee for another, is compellable in chancery to execute that trust. However liable he may be in many cases to respond in damages, yet, if he is a trustee, he will be compelled to fulfill the trust, as well in personal concerns, as in real. Thus, where lands are devised for the payment of debts; if any person is appointed by deviser to sell and he accepts the trust, he is compellable to sell; for he is a trustee for the creditors. If the

person appointed to sell, refuses to accept the trust, or if no person is appointed, chancery appoints some person who will undertake the business.

Chancery will direct an equity of redemption to be sold; for, in equity, the owner is considered as a trustee for creditors. So, too, the heir to, or devisee of, real property, is bound to pay judgment and specialty creditors of their ancestor or testator their debts, if they have assets, if it is demanded of them; but are not bound to pay simple contract creditors. If, then, those creditors whom they are bound to pay, do not demand of them their debts, but recover from the executor their demands; the creditors by simple contract, may be defeated of their due, by this means at law. But, in equity, the heir or devisee, is considered as a trustee for them, to the amount they are liable to judgment and specialty creditors, if they have assets to that amount: and the heir is also a trustee for legatees, whilst the devisee is * not, provided his devise was specific. If the legacies are charged upon [444] the land, he is also a trustee for the legatees.

If the specialty creditors come upon the heir, as they may, if they choose so to do, when the personal fund is sufficient to pay all the claims, the executor is trustee for the heir, to the amount which he had paid to the specialty creditors. Under these several cases, chancery will compel a fulfillment of these trusts. If a bond, covenant, promise, or grant is made by A to B, for the benefit of C; B has the legal title to the instrument and whatever is conveyed by it; but C has all the beneficial interest therein. Chancery will compel B to collect the bond, and pay it over, according to the nature of the trust, to C. If C's character is such, that he ought not to have the disposal of the avails of the bond, &c., and this was the reason why a trust was created, the trust will be so executed, as to comport with the original intention of the obligor, grantor, &c. If an estate had been given by A to B, in trust for C, before the statute of uses; and since that statute, if it be given to B, for the use of C, in trust for D; the person for whom it is in trust, is entitled to the beneficial interest; and this trust must be executed according to the circumstances of the case. If it appears from the grant, or is fairly inferable from the circumstances attending the case, that the gran

tor intended that the estate should pass to the *cestui que trust*, at a particular time; at that time, and not before, chancery will compel a conveyance to the *cestui que trust*. If this was not intended, but if the beneficial use which was intended were the receipt of the rents and profits from time to time; this beneficial interest the *cestui que trust* shall have, and the trustee shall be compelled to fulfill such trust. The *cestui que trust* is in no danger of losing [*445] this interest, unless the trustee should convey the legal title to a *bona fide* purchaser; that is, to a person ignorant of the trust. In Connecticut, where all deeds are recorded in the town clerk's office, in every town, and where we hold that the record is constructive notice of a sale, there can be no *bona fide* purchaser of a trust. Chancery will enforce implied trusts, even with respect to real property, where the proof of the trust does not depend on witnesses testifying to the terms of the contract, but upon the proof of facts from which the inference is satisfactorily made, that there was a trust. These facts are proved by parol testimony: As if A should employ B to sell land for him; and should, for this purpose, to enable B to convey a title, convey the land to B; and B having received the deed, refuses to sell, but retains the deed, and claims the land: or if he do sell, and receive the avails, and refuse to pay over the purchase-money to A, although parol proof is not admissible to prove the terms of the bargain: yet facts may be proved, which demonstrate that a trust existed; and chancery will compel the execution of the trust. 2 Pow. on Con., 255; Pow. on Mort., 65; 1 Vern., 356; 1 Atk., 386; 2 *ibid.*, 150; Amb., 409; Ca. Temp. Tal., 61.

It is on the ground that executors are trustees for legatees, that chancery compels the payment of legacies by them.

There is a class of cases, where persons are considered trustees in equity, who are not so considered at law. As for instance, A devises Blackacre to B, for the payment of his debts; B assumes the trust, sells the land, and pays all the debts; and finds in his hands, a residuum of one thousand dollars. In this case, B has the legal title: and not being considered at law, a trustee, he retains the money; there being no claimant known in law, who is entitled to it. In equity, B is considered as a trustee of

this money, for the person or persons, to whom the * land would have descended, if there had been no devise of it. [*446] Such trust, is called a resulting trust. On the same ground, chancery considers an executor, to whom a valuable legacy is given; who has paid every debt and legacy, there being no residuary legatee, and finds in his hands a surplus; a trustee of this surplus for those to whom the whole estate would have gone, after payment of debts, if the testator had died intestate. At law, the executor would have retained this surplus; having the legal title; and there being no person known in law, who could call it out of his hands. This equity in favor of the heir in the first case, and the legal representatives in the last case, is capable of being rebutted, by parol proof: that is, parol testimony would be admitted to prove, that in the case of the devise for the payment of debts, the testator had declared, that if there was any surplus, after the payment of debts and legacies, the trustee should be entitled to it: on this proof, chancery would not decree in favor of the heir, but would leave the surplus in the hands of the trustee. So, too, in the case of the executors, the equity of the personal representatives may be rebutted. Since the introduction of the action, for money had and received to the plaintiff's use, which is wholly governed by the principles which prevail in a court of chancery; what would prevent a recovery at law, in the cases before named, of the devisee and executor? If the principles adopted by chancery be correct, it would seem that there ought to be a remedy at law, for a person to recover that which belongs to him. For chancery considers such money, as the money of one man, in the possession of another man. If the true point of light in which this subject ought to be viewed, be, that whoever has the legal title, also equitably owns the surplus; then chancery has changed the law, and adopted principles diametrically opposed to law. If the reason why the person, * who had the legal title, was allowed to retain the surplus [*447] in such cases, be, that there was no appropriate remedy to enforce an equitable claim; it would seem that the action for money had and received to the plaintiff's use, might be successfully used.

A fraudulent trust, that is, one made to deceive creditors or purchasers; or a trust, which, from the nature of it, has a ten-

dency to give a person a false credit; will never be enforced in chancery. 2 Vern., 638. Principles of policy govern in this case. A, to defraud his creditors, conveys away his estate to B, without any consideration, other than B's engaging to let him have the benefit of his estate, and to reconvey, when A desired it. This is a secret trust between A and B, and fraudulent. If A should desire B to reconvey, according to agreement, and B refuses, and insists upon holding it against A, because it is fraudulent; chancery will not interpose in A's favor. The object of the law is, to deter from such practices. It surely is a great restraint, when it is understood that the grantor is wholly in the power of the grantee; that no equity which there may be betwixt him and the grantee, is such, that the grantor can have the least benefit of it, but at the pleasure of the grantee; that no covenant on the part of the grantee, lays him under any obligation to perform his covenant; and that, though the grantee is, *particeps criminis* in this transaction, yet his title, so far as respects the grantor, is as valid, as the fairest and most honorable conduct could make it. If A was in possession, B could eject him, by a title so obtained. Such cases are not governed, as has been supposed by some persons, by the principles which govern illegal contracts, when both parties are *pari delicto*. The law there, never assists either party; but in this case, as full assistance is given to the fraudulent grantee, against the fraudulent grantor, as could be given to the most honest grantee, against his grantor.

*CHAPTER IV.

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OF THE POWER OF CHANCERY TO COMPEL PARTITION AMONG JOINT TENANTS. OF RELIEVING AGAINST LAPSE OF TIME. OF GRANTING INJUNCTIONS; AND IN WHAT CASES. OF THE POWER TO CORRECT MISTAKES IN INSTRUMENTS. OF THE POWER TO APPOINT GUARDIANS, AND TO REMOVE THEM.

CHANCERY, also, exercises the power of compelling joint tenants, tenants in common, and coparceners, to make partition in severalty. The ground, on which chancery assumed the power, was probably this; that, in some cases, the legal remedy was not adequate; for one tenant would have the possession of the title-deeds; in which case, the other would have no remedy at law, to compel the production of them, which power chancery possesses.

Chancery will relieve against the lapse of time, where accident or misfortune has prevented the punctual fulfillment of a contract, or performance of a duty imposed by order of court. This relief is never granted, but on condition of the most complete justice being rendered by the applicant; and not even on these terms, if there were great danger that negligence would be too much encouraged thereby.

When a controversy cannot be settled at law, but by a multiplicity of suits, chancery has interfered. Though it cannot be said, that there is not a legal remedy, appropriate to each suit; yet, the remedy at law is not adequate: for the number of suits to be brought, to settle the controversy, would be so numerous, that the expenses * of the suits, would ruin the parties. Pr. in Can., 261; 1 Vern., 28, 266, 308; 2 Pow. on Con., [*449] 217; 1 Vern., 189.

Chancery exercises the power of granting injunctions, in a variety of cases. In all cases where an action at law will lie, for waste, chancery will grant this specific remedy, by enjoining the tenant not to commit waste. There also are cases, where

chancery enjoins against the commission of waste, although there is no remedy at law. The same course has been taken by courts of law, respecting the remedy for waste, as in cases of contracts: they have not extended the remedy to cases where the principles, on which they allow the remedy, would have warranted them to extend it to all those cases, where chancery enjoins against waste. A court of law will not sustain an action by the remainder-man, or reversioner, if any other estate intervenes, betwixt the remainder and the particular estate. As, where an estate is given to A for years, with remainder to B for life, remainder in fee to C; in this case, A, the tenant, commits waste: C, the remainder-man, cannot sustain an action at law against A; there being between his estate and A's the intervening estate of B, for life. In this doctrine there might be some reason, if B was entitled to an action; but he is not: no person but the owner of the inheritance can sustain this action. Of course, A may commit as much waste as he chooses to commit, and there is no remedy at law for C; and the only reason given is, that the freehold was not in him, but in B, who had a life estate therein. It is difficult to understand, why such a course of decisions should have taken place. The law, both common and statute, gives this action of waste, to the owner of the inheritance: and that, in all cases, where the waste is committed. In the case put, the inheritance belonged to C; and it was that which was injured. * Upon principle, then, C would [*450] be entitled to an action at law. This principle is carried into effect by chancery, although the courts of law stop short. A court of chancery applies the principle in such case, and accordingly will enjoin A, the tenant for years not to commit waste. So, too, where there is a tenant for years, or life, with a contingent remainder in fee, no action at law lies for the remainder-man. In this case it is said, that the inheritance is not vested in the remainder-man, but in abeyance. Suppose it is not: who will probably be injured? Is it not the contingent remainder-man? And, although there is no certainty that he would ever be entitled to damages (for, perhaps the remainder will never vest, and this may be a good reason for not maintaining an action at law), yet, upon the principle of preserving the inheritance

from being injured, the acknowledged principle in cases of waste, a court of chancery will enjoin the tenant not to commit waste, on the application of the contingent remainder-man, or his *prochein ami*. No action lies at law, against the person who has the legal title, as in the case of a trustee for another person: yet it is apparent, that a remedy ought to be applied in such a case, to preserve the inheritance unhurt, for the benefit of the *cestui que trust*: and a court of chancery, in the exercise of their power over trustees, will enjoin such trustee not to commit waste. 2 Show., 69; 1 Ek. Abr, 222; Lord Ray., 88; 3 Atk., 94, 702; 3 Term, 450. It is said, this is a case where the law affords no remedy. Perhaps this proposition may be found too broad. A technical difficulty may prevent an action of waste lying against the person who has the legal title; but, where such trustee commits waste upon that estate, to the profits and avails of which another is entitled in equity, it is plain, that the equitable rights of the *cestui que trust* are injured by a breach of trust in the trustee; and at this time we may venture upon * the proposition, that for an injury done to an equitable right, [*451] an action at law may be maintained, and damages recovered.

When a lease for life is made with these words "*without impeachment of waste*" it is understood that such tenant is not liable for waste; so that an action at law cannot be maintained, in any case where there is that provision. But chancery has interfered, by granting an injunction in such cases, where the waste was wanton and malicious. As, where a tenant for life, without impeachment of waste, of a valuable mansion-house, began to strip the house of large quantities of lead, and of the weights and ornaments belonging to the house. So, too, where the avenue to a beautiful seat was ornamented, for fifty rods, with trees of the forest; and the tenant for life was about cutting them down, out of malice, being in controversy with the owner in fee: chancery has supposed that the words "*without impeachment of waste*" ought not to be construed to extend to such cases as those just mentioned: for such waste could never have been contemplated by the parties. No person can be supposed to have intended to give a license to commit such waste. 2 Show., 169; 2 Vern., 788; 2 Salk., 216; 1 *ibid.*, 161; Amb., 107; 2

Cro., in Can., 89. Chancery grants injunctions to stay proceedings in a court of law, on such contracts as chancery rescinds, and courts of law sustain suits. This is done before a suit is commenced, and after; and even after verdict, judgment and execution granted. 1 Vern., 229, 487; 2 *ibid.*, 71. This is done under a penalty, which penalty is recoverable only in chancery.

It often happens that suits are brought at law, and the defendant applies to chancery for an injunction. Whether it can be [*452] granted, depends upon the truth of what is alleged in the bill. In such case, a temporary injunction * to stay proceedings is granted; and, if the bill is found to be true, the injunction is made perpetual. If it is found not true, the injunction is dissolved. If the suit is not commenced, the injunction goes against the party. If the suit is commenced, then it goes against the party and the court, until the execution is issued. If the execution has issued, it goes against the party, and the officer in whose hands the execution is for collection, to prevent a levy. If the execution has been levied, and the money is in the hands of the officer, the injunction goes against such officer, to prevent his paying it over. If the money has been paid over, an injunction cannot issue.

We are told that chancery will correct mistakes in instruments, if different words are used in the instrument, from what was intended by the parties: but if the scrivener used the words which they intended that he should use, that chancery will give no relief; although the words have a different import at law from that which the parties supposed they had. Such a distinction appears more like inflicting a penalty upon one of the parties, for not understanding the legal import of the words used, than a regard to equity.

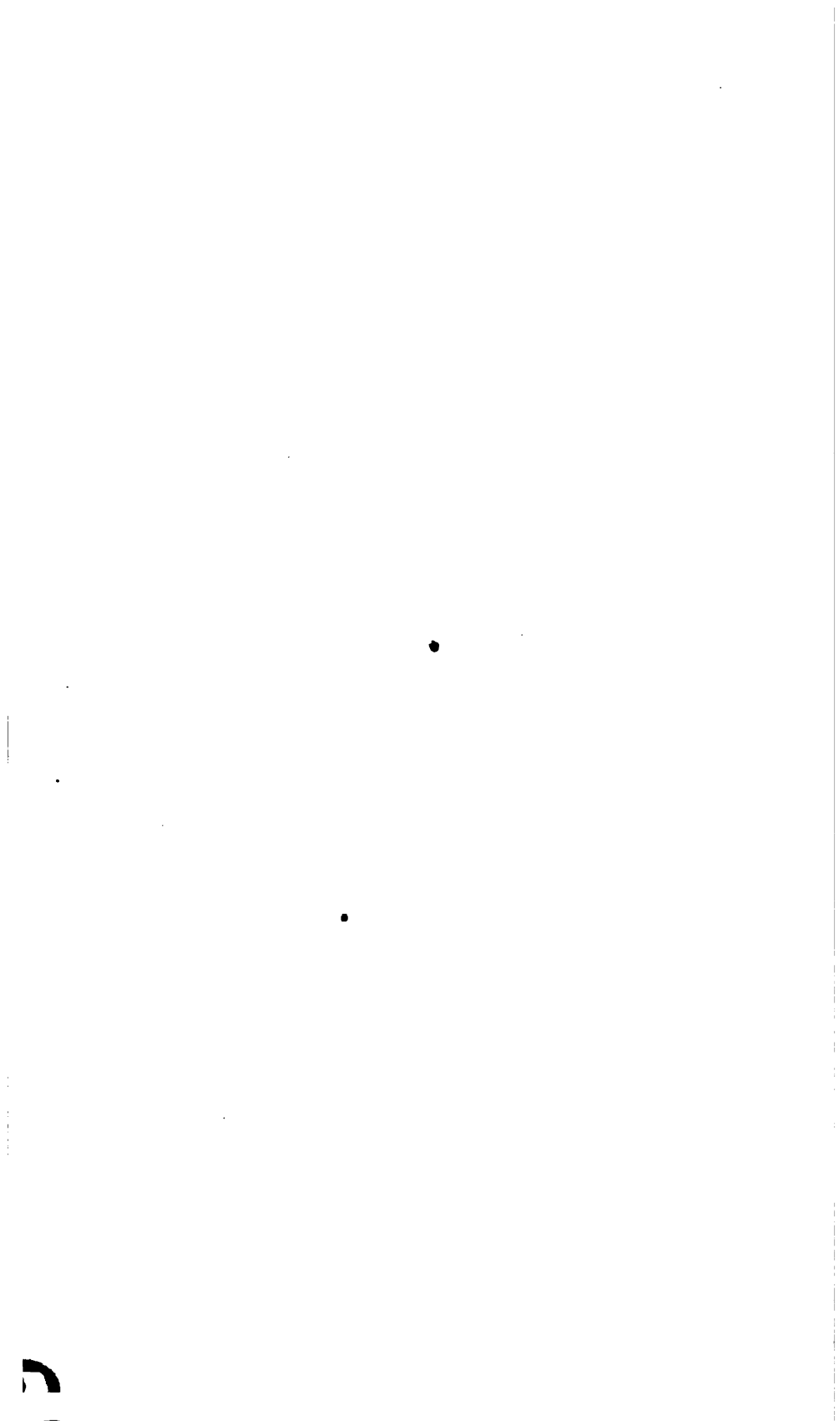
Courts of chancery, in England, have the power of appointing guardians; a power which they exercise only in those cases where no guardian has been appointed. This power grew out of the royal prerogative. The king, as *paterfamilias*, has the care of all the minors in the kingdom. This care is, by him, delegated to the chancellor, who is paramount guardian to all minors. The chancellor, also, exercises the power of removing

improper guardians, and appointing others. Even a testamentary guardian is liable to be removed.

The court of chancery, in the exercise of their power over minors, where they are wards of guardians appointed * by that court, will forbid the marriage of such ward with [*453] any particular person; and this the court does, on suspicion that the ward is about to marry, to his or her disparagement.

Chancery, also, in the exercise of its care for minors, will prevent them from rescinding contracts made by them, which prove to be very beneficial to the minor.

Chancery will not only compel a trustee to fulfill his duty, by executing a trust; but will remove him, if he be an improper person to execute his trust, by reason of lunacy, intemperance, or a profligate life, which is often the case with executors and administrators. So, too, chancery will compel a trustee, in some cases, to give bond for the faithful discharge of his trust, as in the case of an executor. A statute compels an administrator to give such bond. In Connecticut, a statute requires an executor also to give such bond.



ESSAYS

ON THE LEGAL IMPORT OF THE TERMS

HEIRS, HEIRS OF THE BODY, ISSUES, &c.,

IN SEVERAL INSTRUMENTS OF CONVEYANCE, &c.

I.

OF THE OPERATION OF THE TERMS "HEIRS" AND "HEIRS OF THE BODY," IN A WILL, OR OTHER INSTRUMENT OF CONVEYANCE.

THE general rule is, that those terms do not denote any particular person, to take by way of description, as devisee, grantee, or donee. Neither does any estate, by the use of those terms, vest in any person in character of heir; but only in the person of him who is named in the instrument of conveyance, who takes by purchase. But the heirs there named do not take as purchasers. They are words merely descriptive of the quantity of the estate given: As, if an estate is devised to A, and his heirs, forever; in this case, A alone takes the estate as a purchaser; and the terms, *his heirs forever*, denote what estate is limited by the devisee to A, viz., a fee simple, wholly in his power to alien or dispose of, as he pleases; and is, upon his death, descendible to his heirs in general. If it be devised to A, and the heirs of his body, this denotes the estate to be an estate tail, descendible to no other heirs but to those of his body. They serve, then, not as a designation of any person who is to take the estate,* but only as descriptive of the quantity of the estate taken [*456] by the devisee. See the case of Brett and Rigden, Plow., 843, where there was a devise to a man and his heirs. The devisee died in the lifetime of the devisor; and the heir of the devisee could not take: for the word *heirs* was not named as a word of purchase, but only to express what estate the devisee should take. The heirs, therefore, are named only to convey the land in fee, and not to make any purchaser other than the

first devisee. So essentially necessary is the word *heirs*, that no estate of inheritance, either in fee-simple or fee-tail, can, by deed, be conveyed without it; but it has, we shall see, in the pursuit of this subject, been very frequently dispensed with in devises.

We find a rule laid down in *Shelley's case*, 1 Rep., 93, that, in any instrument, if a freehold be limited to the ancestor for life, and the inheritance to his heirs, either mediately or immediately, the first taker takes the whole estate. If it be limited to the heirs of his body, he takes the fee-tail; if to his heirs, he takes a fee-simple. Wherever, therefore, we find an estate given to one for life, and to his heirs, or to the heirs of his body, and there is nothing more in the case, the first taker invariably takes a fee-simple in the former case, and a fee-tail in the latter; and this as well in a devise as in any other instrument of conveyance. This is allowed, on all hands, to be an incontrovertible position. See *Perin and Blake*, reported in 4 Bur., 2579.

Thus far, the rule in *Shelley's case* has prevailed, without contradiction, notwithstanding that it was founded upon reasons of feudal policy, which have long since ceased. However, in devises, the rule in *Shelley's case* has been frequently broken in upon; for it is an axiom of the English law, that wills are to be construed according to the intention of the testator, if that intention be * manifestly clear and consistent with the rules of [*457] law. In the application of the rule, there has been a very great difference of opinion among the most distinguished lawyers of the English nation; the consequence of which is, that the cases on this subject are not reconcilable; for, whilst it is contended by some that if, upon the whole will taken together, there appear a manifest intention to give an estate for life only, the first taker shall take no greater estate than an estate for life. On the other hand, it is contended that, so long as the testator has used technical expressions to which the law has affixed a determinate meaning, the law will not suffer their sense to be prevented: and, in such case, the intention of the testator, be that intention what it may, is controlled by the superior force of those technical expressions; for, say they, the intention of the testator, although manifestly clear, is not consistent with the rules of law. If the former sense of the axiom be just, I cannot conceive that

any case can arise upon a will where there is a devise to one for life, in which he can take any greater estate. The intention of the testator, in such case, is as clear as it can be made by the most perspicuous language; for he has limited a life estate to the devisee expressly. But this, of itself, is not contended by any English lawyer to be sufficient evidence of an intention to give no greater estate than an estate for life, when an estate is thus given to one and his heirs. But it is agreed, on all hands, that where an estate is given to one for life, and to his heirs, that the first taker has an estate in fee; and the terms, *for his life*, signify nothing. Still, it is contended by some, that, if there are other expressions in the will, indicative of an intention to convey only an estate for life, in such case no greater estate is given. They ground themselves, I apprehend, upon this: that, although the natural import* of the words, *to one for life and to his heirs*, would have been to give to the devisee an estate for [*458] life only; yet, since the doctrine before-mentioned had been established in Shelley's case, and the legal sense of these terms was universally understood to give them any other than the legal technical construction, would, most probably, thwart the intention of the testator; for the presumption, in such case, is, that the deviser used them in their well-known and established sense. To construe such devise to be a fee, then, would probably fulfill the intention of the testator, the great thing to be observed in the construction of wills. But they maintain that, whenever it appears in the will, by any other language there used, that the testator did not attach to those technical expressions their legal technical sense, the presumption of their being so used is rebutted and removed out of the way; their natural import is restored, and they shall be construed to convey nothing more than an estate for life.

With them it is a maxim, "once fix the *intention*, and the law decides upon it without ambiguity; and that, as to the modes of expression, the law had established none for wills. The testator might use such as pleased him; the law would supply, or would construe, entirely to fulfill his intention." As to the restrictive clause in the maxim, which requires that the testator's intention should be consistent with the rules of law, they urge, that this is

not applicable to the construction of any words used by the testator; and that the opinion, that technical expressions must be construed according to the meaning affixed to them by law, although it manifestly appears that they were not used according to that meaning, is a mistaken opinion; although they admit, that when he used those expressions, and there is nothing explanatory of a contrary intention, they should be understood in their legal sense. They urge, that this restrictive clause is only [*459] applicable *to the nature of the estate. If the testator should undertake to convey an estate such as the law forbids, his intention cannot be complied with: as where the testator undertakes to create a perpetuity, or to make a chattel descend to heirs; for this would be empowering persons to vary the rule of property which the law has established. This, therefore, arises from the want of power in the testator. It is what he cannot do by any words whatever; but there is no want of power in a testator to devise an estate for life to one, with a limitation of a fee to another. And, upon this ground, they contend, that sundry cases may be found, in which the term *heirs*, not only in a will, but in a deed, where not so great indulgence is allowed to the intention of the testator, has been taken as a word of purchase: and as a leading authority, they cite Archer's case, 1 Rep., 66: which was a limitation in a devise to A for life, and to the next heir male of the body of A, and the heirs male of such next heir male; and it was determined that A took an estate for life, only, and the heir male a remainder in tail, vesting in him by purchase, and this from the manifest intent of the testator, that it should be so. To the same purpose is the case of Clerk and Day, Cro. Eliz., 818. For although the phrase *heirs male* was sufficient to give an estate tail, as appears from a great variety of authorities; and such limitation to A for life, and to his heir, would have given an estate tail in A: yet, notwithstanding, by using the phrase *next* heir male, and the superadded words of limitation, *his heirs male*, it was manifest that he used the phrase, *next heir male*, as *descriptio personæ* who should take an estate tail; and if so, A could have no greater estate than an estate for life. To the same purpose is the case of Luddington and Kime, Ld. Raym., 208; where A devised lands to B for

life, without impeachment of waste; and in case he should have any issue male, then, * to such issue male and his heirs forever. This was considered as strong a case, as if the [*460] phrase, *heirs male of his body*, had been used; because the term *issue*, in a will, is to be considered as much a word of limitation as *heirs*. For this, see the authorities after cited. In this case, it was construed to be an estate for life only in B, and a contingent fee in his issue male. It is plain, that this case was determined upon the clear intention of the testator, that B should take for life only; and not because there was any difference in the operation of the terms *heirs* and *issue*; for, say the court, if B is supposed to take an estate in tail, then must be rejected the words *without impeachment of waste*, and the intention of the testator defeated in the superadded words, *his heirs forever*. From which it was certain, that the intention of the testator was, that the heirs general, male and female, of the issue, should inherit; which could not be the case, if B took an estate of inheritance; for the estate, if any, must be an estate tail male, by reason of the words *issue male*. In no way could the intention of the testator be fulfilled, but by giving to B an estate for life only, which was done. So is the case of Backhouse and Wells, 1 Eq. Ca. Abr., 184, where there was a like determination. The devise was to A for life only; and, after his decease, to the issue male of his body, and to the heirs male of the bodies of such issue.

In the case of King and Melling, 1 Vent., 281, a case is cited, where a man devised to one for life, and *non aliter*, and, after his decease, to the sons of his body, which was equivalent to heirs male of his body. This was held to be an estate for life, by reason of the words *non aliter*. For the same purpose, *Lowe v. Davis*, Ld. Ray., 1561, is relied on; which was a devise to Benjamin Deven, and the heirs of his body, the first, second and third, and every other son and sons successively, of the body of the * said Benjamin, and the heirs of the body of such first, [*461] second and third, and every other son and sons lawfully issuing, as they shall be in seniority of age, and priority of birth; the eldest always, and the heirs of his body, to be preferred before the youngest, and the heirs of his body; and, in default of such issue, then to his right heirs forever. It was determined that

Benjamin Deven took an estate for life, only upon the manifest intent that he should have no greater estate; for it was certain that the testator, notwithstanding his using the phrase *heirs of his body*, in the devise to Benjamin Deven, meant to give to the devisee's eldest son an estate tail, remainder in tail to his second son, and so on; which intention could not be fulfilled, if Benjamin Deven took an estate tail. Therefore, to fulfill the intention of the testator, Benjamin Deven could not take a greater estate than for life.

To evince that the term *heirs* may be considered as a word of purchase, and that it is not necessarily a word of limitation, denoting a succession of certain persons, see the case of *Lisle and Gray*, T. Raymond, 315; where John Lisle covenanted to stand seised of land, to the use of himself for life; remainder to his son Edward for life; remainder to the first son of Edward in tail; with like remainders to his second, third and fourth sons, and sons separately and respectively, to each of the heirs male of the body of Edward, and the heirs male of their bodies; remainder to William Lisle. It was urged that here was a conveyance to Edward for life, and, in the same instrument, to the heirs of his body; and that, therefore, he took an estate tail, agreeable to the rule in *Shelley's case*. But it was determined, that Edward took only an estate for life; for it was supposed to be clear, that, when the grantor had limited an estate tail to four of Edward's sons successively, that the subsequent words, *to each of the heirs male of the body of Edward*, intended each of the * other sons; and more especially, because there were [*462] superadded words of limitation. It was urged, that, whenever the intention of the testator appeared, if it was a clear intention to give an estate for life, no greater should be taken: that there could be no particular magic in any particular words; for if some words in a deed, or will, evince of the testator's intention, can turn the words *heirs of his body*, into words of purchase, then other words may do the same; provided they do equally demonstrate that intention. That this was the real ground of the determination in *Bagshaw and Spencer*, reported in 1 Ves., 142, will be manifest to any one who reads Lord HARDWICK's reasons for his judgment in that case; which was a devise to

trustees to the use of Thomas Bagshaw, for the term of the natural life of the said Thomas, without impeachment of waste; and after the determination of that estate to said trustees, during the life of said Thomas; and, after his decease, to the use of the heirs of the body of the said Thomas. Lord HARDWICKE said, that the devise being to him, without impeachment of waste, was a proof that a life estate was intended; for, if a greater was in view, that provision could be of no use; and that it was certain that the testator meant to give an estate that was forfeitable; for if it was given to trustees, after the determination of Thomas Bagshaw's estate for life; that this estate could determine only by the death of said Thomas, or by forfeiture. The first could not be meant, because the remainder to trustees is given only during the life of said Thomas. The last, therefore, must be meant, viz., determination of the estate by forfeiture. His intention, then, was to give an estate that could be forfeited, which could not be a fee; for that is not forfeitable. Of consequence, a life estate must be intended. These circumstances were considered as furnishing a complete demonstration of the testator's intent to give * an estate for life; and it was thus determined: and that the word *heirs* was, in this case, a word of *purchase*. [*468]

It is true that Lord HARDWICKE, after having given these reasons, considers this case as being different from a legal estate; being a trust estate, cognizable in equity, where the testator's intention was more to be regarded. But we shall find, upon examination, that this idea cannot be supported; the current of authorities having always been, that the rules of property must be the same in both courts; and in the latter authorities, it is utterly exploded. Whoever reads Lord HARDWICKE's argument in this case, will be convinced, that he was dissatisfied with the opinion of the court of king's bench, in the case of *Coulson v. Coulson*. He therefore laid hold of a supposed distinction betwixt legal and trust estates, to avoid overturning that decision. But in the case of *Watts v. Ball*, P. Wms., 108, we find it declared by Lord COWPER, that trust estates were to be governed by the same rules, and were within the same reasons, as legal estates. See the same doctrine admitted in *Phillips v. Phillips*;

P. Wms., 35. In the case of *Bale v. Coleman*, the opinion of Ld. NOTTINGHAM, in the Duke of Norfolk's case, is cited; where he laid it down as a maxim, that trusts should be governed by the same rules as legal estates. The opinion of Justice WILLES, in the case of *Perin and Blake*, is to the same purpose. In the case of *Long and Laming*, Bur., 1100 Lord MANSFIELD says, "A court of equity is as much bound, by positive rules concerning property, as a court of law is. What is sufficient upon a devise to make an exception out of the rule, (referring to the rule in *Shelley's case*,) holds as well in the case of a legal estate, as in a trust. If the intention be contrary to law, it can no more take place in a court of equity, than in a court of law. If the intention be illegal, it is equally void in both." The same doctrine is [*464] fully recognized by * Lord THURLOW, in the case of *Jones and Morgan* reported in *Browne's Chancery Cases*.

To establish the same point, viz., that where the testator gives an estate to one, and limits it over to the heirs of his body, and plainly intends that the heirs shall take by purchase, this intention shall be fulfilled: the case of *Long and Laming* is relied on. This was a devise of gavelkind lands, to A. C. and to the heirs of her body, as well females as males: which intention must have been, that the heirs take as purchasers; and consequently, that A. C. should take only an estate for life: as it was impossible that females should take, in a course of descent, lands that were gavelkind; which descend to none but males. And this intention was fulfilled, by the judgment of the court.

In the case of *Long and Laming*, is cited the case of *Waker v. Snow*, reported in *Palmer*, 349; which was upon a deed where E conveyed lands to the use of himself, for life; remainder to his first son, and the heirs male of his body begotten, &c.; and so to his six sons, remainder to the right heir male of the said E, to be begotten after the sixth son, and his heirs male. This was holden, not to be an estate tail in E, notwithstanding the limitation to E's right heir, after the sixth son; it being apparent that he meant *after born* son, as much as if he had said so. And remarkable are the words of Justice WILMOT, when observing upon the case: he says, that "the word *heirs* is not to be construed as a word of limitation, either upon a will or deed,

when the manifest intention of the testator, or of the parties, is declared to be, or clearly appears to be, that they shall not be so construed." There is a case stated by Anderson, in Shelley's case, of a limitation to the use of A for life, remainder to the use of his heirs, and their heirs female; where it was determined that *heirs* was a word of purchase; and consequently, that A took but an * estate for life. The intention of the [*465] testator would have been defeated if A had taken an estate tail; for in such case, by the force of the term *heirs*, he would have taken an estate tail general descendible to any heir. Whereas, it was certainly the design of the testator, to create an estate tail female in the heir of A, by purchase.

From the foregoing authorities, it is considered as demonstrated, that a strict legal construction, or a technical sense of any words, should not prevail against the superior force of intention, apparent on the instrument. Whenever, then, the matter becomes certain, that the term *heirs* is used with an intent that they should take as *purchasers*, it is contended that the instrument should be so constructed. As, where an estate is given for life, with a limitation to *heirs* or *heirs of the body*, of the devisee: although no inference can be made from the words themselves, that the devisor used them otherwise than in their legal sense; yet, if it appear from other expressions, that he so intended, they shall take as purchasers; and the devisee, an estate for life only. See Justice BULLER's argument in the case of *Hodgerson v. Ambrose*, reported in Douglas. "For such an intention," says he, "is consistent with the rules of law; and such estate might be given, without the infringement of any rule." Of this opinion was Lord HARDWICKE, in *Bagshaw and Spencer*; Lord MANSFIELD, in *Perin and Blake*; Justices ASTON and WILLES, same case; Sir JOSHUA JEKYLL, in *Papillon v. Voyce*, reported in P. Williams; Chief Justice DE GRAY and Baron SMYTHE, in the case of *Perin v. Blake*, in the exchequer chamber, together with many other distinguished characters.

On the other hand, it is allowed that the intention is to govern, if clear, and consistent with the rules of law. But it is contended, that it is necessary to determine upon * the [*466] whole will, whether by the word *heirs*, the testator meant that

succession of persons so denominated by law: and if he did, that the rule in Shelley's case must take place, at all events; even if the testator had directed that the heirs should take as purchasers, and that the immediate devisee should take only an estate for life. But where the word is used in any other sense, and instead of being intended to be used as *nomen collectivum*, is used as *designatio personæ*, then the rule in Shelley's case is not to be applied, and the limitation is to take effect, as if proper words had been used: that is, if the testator meant the estate should go to him who should be heir; then let his intention be what it might, as to the heir's taking as purchaser, the case is to be governed by the rule in Shelley's case. But, if he meant that some particular person should take, inaptly denominated heir, the intention of the testator is to be fulfilled. If the design were, to give the estate to those persons known in law, as a class called heirs, be they who they might, they must take by descent, and not by purchase; it being a rule, that where the heir takes in character of heir, he must take in quality of heir. But where it is apparent that the testator's intention was, to give it to some particular person, by the denomination of heir, as his first or his seventh son, to the exclusion of others that might be his heirs; the intent being the same as if he had said, "to my first son and his heirs;" in such case the son would take by purchase; and the estate become descendible to the heirs of such son, and not to the heirs of the testator. For authorities to support this opinion, see the case of King and Melling, Vent., 225. This was a devise to B for life, and, after his decease, to his issue by a second wife; and for want of such issue, to J. M., with power to B, to make a jointure of the premises, to such second wife. This was determined in B. R. to be an estate for * life, against the [*467] opinion of HALK; upon the intent of the testator to give such estate only, appearing from the circumstances of empowering B to make a jointure; which was not necessary, if it was intended he should take an estate greater than for life. But this judgment was reversed, the intention notwithstanding: for the word issue, in a will, was held to be *nomen collectivum*, and equivalent to heirs of his body: and no intention of using the word as *designatio personæ*, any where appearing, the rule of law took

place. This case, I apprehend, cannot be reconciled with the before cited case; which was ruled to be an estate for life, by reason of *non aliter*. In that case, the intention of the testator to give an estate for life only, governed: whereas, in this, the intention was disregarded, because the word *issue* was used as *nomen collectivum*, when the term *sons* was, in that case, as really as *nomen collectivum*, as *issue* was in this.

The same doctrine is supported, by the case of *Colson v. Colson*, 2 Atk., 247. It was a devise to C for life, remainder to A and B, and their heirs, to preserve contingent remainders; remainder to the heirs of the body of C. In this case it was determined, that an estate tail in remainder was vested in C; he taking a life estate, not merged by the devise to the heirs of his body, by reason of the remainder interposing between the devise to C for life, and the subsequent limitation to the heirs of his body. Nothing can be more certain, than that the intention of the testator was, to give only a life estate to C, apparent from his placing trustees, to take advantage of any forfeiture of the estate; which could be only in case he was tenant for life; which intention was made to yield to the rule of law, that the ancestor cannot make his heir purchaser *eo nomine*. That his heirs, as heirs, should take *per formam doni*, was sufficiently manifest; there being nothing to point out, that he used the words* as *designatio personarum*; and although he intended that [*468] they should, in character of heirs, take as purchasers, it was determined that this intention could not be fulfilled, being prohibited by law.

I apprehend, that it is impossible to reconcile this determination with that of *Bagshaw and Spencer*, unless upon the exploded ground, that a different rule of property obtains where it is a trust estate, from what obtains where it is a legal estate. It is true, there was, in that case, the clause *without impeachment of waste*. But this could make no difference; for it was only another evidence of the testator's intention. But that could be of little weight, where that intention was sufficiently clear. In a dubious case of intention, it might serve to remove the doubt; but could add nothing to the measure of evidence, where it was completely full without it: as in the case of *Colson v. Colson*.

To the same purpose, is the case of *Duncombe v. Duncombe*, reported in 3 Lev. See the case of *King v. Burchell*, cited in Bur., 1108; where lands were devised to J. K. for life, and to the heir male of J. K. and his heirs; and for want of such issue, over. This was determined, notwithstanding the superadded words of limitation, to be an estate tail in J. K.; for it was said, that the superadded words were nothing but a superfluous declaration of what was implied in the phrase *heir male*, which includes all that the superadded words include. This case, I apprehend, cannot be reconciled with the case of *Backhouse v. Wells*. In that case, the phrase *issue*, is used instead of *heirs*. But if the phrase *issue*, in a will, be of the same import as the phrase *heirs*, which seems an acknowledged point with English lawyers, and is mentioned by Powell on Devises, 356, as an indisputable point; then the cases are directly opposed, unless some magical powers are attached to the phrase *heirs*, which make it mean something diametrically opposite * to another word of the same signification.. Justice YATES, in his argument in the case of *Perin and Blake*, observes, that "in *Backhouse and Wells*, and *Luddington and Kime*, the phrase *issue* is used, not *heir*: so not to the point, to show, in that case, that the intention of the testator was to prevail; for that those cases were not within the rule laid down in *Shelley's case*." A man of less discernment than Justice YATES, would have never discovered but that it was within the rule. If a phrase of the same signification as *heir*, were made use of in an instrument, he would have conceived that the same construction would have been given to it. It would have struck him either as an absurdity, or as a distinction too nice for him to comprehend, that whenever *issue* and *heir* were used in a will, they meant one and the same thing, and were both words of limitation: but if *issue* was used, then the devisee might take one kind of estate; and if *heir*, it must be of a very different kind. But was not the determination in *King v. Burchell*, opposed to the rule that a devisee may be described by the word *heir*, if the testator plainly shows, that the phrase *heir* was meant by him as *descriptio personæ*? See the rule in *Powell on Devises*. Justice YATES admits, that the evidence of intention, was of the strongest kind in this case; and most certainly it was; for why

should he have expressed himself in the singular number? But more especially, the superadded words of limitation, demonstrate that he intended the phrase *heir male*, as *designatio personæ*; for to his heirs he gives the estate, and not to the heirs of J. K.; and to say that they are superfluous, only furnishes an argument in favor of the intention, that heir male was intended as *descriptio personæ*; for, otherwise, there can be no reason given for his using them: they convey no idea whatever. But if we consider them as designed to afford us evidence that the heir * male should take *descriptio personæ*, they become important, and [*470] we see very good reasons for using them.

If a term which may have two very different significations be used in an instrument, and with it are connected other terms clearly indicative of the sense in which the author intended it; it seems strange logic to say, that the explanatory words shall be rejected, and the dubious term left for construction, without the aid of the explanation afforded by the author. It is also opposed to the case of Clerk and Day, Cro. Eliz., 818, which was a devise "to R for life, and, if she have heir of her body, to that heir, and the heirs of their bodies, and a remainder over." This was determined to be an estate for life in R, and that the heir took as a purchaser. The case of Minshall v. Minshall, 1 Atk., 412, was a devise "to R, and the first heir male of his body, and the heirs male of his body, and a remainder over." This was held to be an estate tail. Is this determination reconcilable with Archer's case? It differs from that case, in that it is a devise to the heirs male of the first devisee, in the plural number. That of Archer's was in the singular number. But this did not vary the case in King and Burchell; and we find in Powell on Devises, 861, that *heir male* is *nomen collectivum*, and conveys the same idea as *heirs male*. And so was the case of Trollop v. Trollop, where the devise was to one for life, and, after his death, to the first heir male of his body. This was held to be an estate tail, in the first devisee. It also differs in this: that the estate given in Archer's case, was to A for life, and his next heir male; in Minshall's case, it was to the first heir male. Certain it is, that if *heir male*, and *heirs male*, mean the same thing, both being *nomina collectiva*, containing all the heirs of the devisee, in

a course of descent, the only difference between them consists in the different signification of the terms *first* and *next*. I conceive * it impossible for any person to understand any difference between the *next heir male*, and the *first heir male*. Of course, the one decision is contradictory to the other; and *first* and *next*, in such case, are of the same import. See Powell on Devises, 268. He there observes, that "*first, next and eldest*, preceding the word *heir*, only express what the word *heir* implies; viz.: *first, next, or eldest*, taken for the future time, the one to succeed the other, according to the course of the common law." It seems, then, the term *heir, ex vi termini*, imports as much as *first, or next, &c.*, and the superadded words of limitation; and they are therefore to be rejected, as meaning nothing; as redundant, superfluous words. So says the chancellor, in the case of *Minshall v. Minshall*. If rejected for that reason in that case, they must be rejected for the same reason in *Archer's case*. And if the term *next heir* conveys no other idea than what *heir* conveys, and is implied in it, then the devise in *Archer's case*, rejecting the superfluous words, stands thus, viz.: "To A for life, and his heir male;" and we find that *heir male* means the same thing as *heirs male*. The devise is then the same, as if it had been to A for life, and his heirs male: and that this would give an estate tail, is admitted on all hands, and not *acintilla juris* is to be found to the contrary. See *Perin v. Blake*. How, then, is the decision in *Archer's case* to be justified? There is yet another difference in the case of *Minshall v. Minshall*, from *Archer's case*. In the latter, there is an express devise for life; in the former, none. But this makes no difference; for the technical meaning of such devise is the same as if the words *for life* had not been inserted; and none pretend but what the rule of law is to prevail; unless you can collect the intention from some expressions besides those of the technical kind. The chancellor, when distinguishing *Minshall v. Minshall*, from *Archer's case*, says, that, in the last, * there was an express devise for life: But of what avail can that be, when, from that expression, without other aid, nothing is collectible of the testator's intention? and all the other words, as *next*, and the superadded words of limitation, are to be rejected, according to the reason-

ing in Minshall's case. It, therefore, stands unaided with any other evidence of the intention, but that which is admitted by all, as affording no evidence of any intention. He also says, that in Archer's case, the devise was to the next *heir male*, not *heirs male*. But of what importance can this be, when they mean precisely the same thing? In the case of King and Burchell, the devise was to J for life, and to the heir male and his heirs.

Here was a devise expressly for life, and to the heir male in the singular number, with words of superadded limitation to his heirs in the plural number. Everything here is found precisely under those circumstances which the chancellor supposed were the reasons why Archer's case was considered an estate for life; and yet this was held to be an estate tail. In King and Burchell, there was no limitation to the next heir male; but that, it seems, conveys no idea whatever. Strip King and Burchell of redundant expressions, and it is a devise to J for life, and his heir male. The same devise is found in Archer's case, when stripped of redundant expressions: the one is an estate tail, and the other an estate for life. And yet both these cases are acknowledged to be good law. We may still go further: the devise for life makes no difference. It is, therefore, in both cases, a devise to one, and his heir male; which is exactly the same devise, as in the case of Minshall v. Minshall, when stripped of superfluous expressions. The case of Goodright v. Pullen, 2 Ld. Ray., 1437, is another case where there were superadded words of limitation; and, in the same devise, he used the phrase *heirs male* and *heir male*, as meaning the same thing; and * yet it was held an estate tail. May it not be questioned whether [*478] these cases comport with the rule admitted by those who are the strongest advocates for the rule laid down in Shelley's case; that is to say, "if the terms *heir*, or *issue*, are so used by the testator, as plainly show that he used them as *designatio personæ*, they shall be thus taken?" Can any man doubt but that they were so used in King and Burchell, where the testator devises to the heir male of J, and his heirs; and in Trollop v. Trollop, where the devise is to the "first heir male?" Goodright v. Pullen, and Minshall v. Minshall, are in the same predicament. I apprehend, that no one will be at any more loss in determining that the terms *heir*

and *heirs*, there used, were as plainly indicative of an intention to use them as terms of purchase, as in Archer's case. The case of Perin and Blake, is a notable case to show in what uncertainty the law was, respecting the operation of such devises, at the time it was determined. It was a devise of lands, by the testator to his son; and in his will, he says, "It is my intent and meaning, that none of my children shall sell and dispose of my estate for a longer time than his life; and to that intent, I devise the residue of my estate (having made other devises to other children), to my son W, during his natural life; the remainder to J, and his heirs, during the life of W; remainder to the heirs of the body of W." Here it was manifest, that the testator intended only an estate for life to W; for he says, that his intention is, that none of his children shall dispose of his estate for a longer time than his life; and, for that purpose, devises to W for life, with remainder to J, for W's life; which could mean nothing, unless to secure the contingent remainders to the heirs of W's body, against the forfeiture of W's estate. He must have had in view a *forfeitable estate*, which must be an *estate * for life*. [*474] And the testator's intention is equally plain, that, although he intended that the heirs should take as purchasers, yet he did not mean to point out any particular person, but all possible heirs in a course of descent. The question was, what estate W took? It was determined in B. R. by MANSFIELD, ASTON and WILLES, against YATES, that he took an estate for life only; from the manifest intent of the testator, that he should thus take, and that this was a lawful intention. Whilst YATES contended, it was immaterial what the intention was, as to the *ancestor's* estate; and the only material inquiry was, what the *heirs* were to take; and to make them take as *purchasers*, they must be designated particularly, which was not done in this case. Upon a writ of error, this judgment was reversed in the Exchequer Chamber, by the opinion of NARES, BLACKSTONE, GOULD, PERRET, ADDAMS, and Chief Baron PARKER, against the opinion of SMYTHE, and Chief Justice DE GRAY. There were seven judges against five; but one of those judges, BLACKSTONE, declared, that, had the testator's intention been sufficiently apparent, to give an estate for life only, he should have voted for affirming the judgment. So

that, as to the great question in the case, there were six judges against six. See *Hodgeson v. Ambrose*, reported in Douglas. The cases cited by the majority of the court of B. R. among many others, were *Law and Davis*, *Waker and Snow*, *Lisle and Gray*, *Archer's case*, *Clerk and Day*, *Luddington and Kime*, *Backhouse and Wells*, *Bagshaw v. Spencer*. The answers to these cases were, that in *Law and Davis*, the first devise was a mere surplusage, in that of *Waker and Snow*, and *Lisle and Gray*, there was an estate to the ancestor for life; remainder to the first, second and other sons, and so on to the heirs of his body. "*So on*," was construed to mean, in the same manner, viz.: *sons*; and, therefore, in these cases, the phrase *heirs* was used, as *designatio * personæ*. The inference, I apprehend to be a just one; but there is not by any means stronger [*475] evidence of such intention, than where the testator uses the phrase *heir male*, with superadded words of limitation, as in *King and Burchell*. As to *Archer's case*, and *Clerk and Day*, they said that the word *heir* was in the singular number, and a limitation grafted on it. This is true; but so was *King and Burchell*. But what difference does it, or can it make, when each word is *nomen collectivum*, and their technical signification the same? If either is to be understood as a word of *purchase*, it must be from some other expressions, and not from itself; and both are capable of being thus construed. As to *Luddington and Kime*, *Backhouse and Wells*, the phrase was "*issue*," they said; but if *issue* in a will, and *heirs of the body*, mean the same thing, it is a weak answer. As to *Bagshaw and Spencer*, this, it is said, was a *trust estate*, and the intention might be executed in chancery. But the distinction between a *trust* and a *legal estate*, cannot be maintained; and without the aid of that distinction, the cases cannot be reconciled.

As to the decision of *Long v. Laming*, it was said to be out of the question, as it was a devise of lands holden in gavelkind. How that should make a difference, I do not comprehend. Yet I conceive, that, in that case, the determination might well proceed upon the ground of the testator's intention to use the phrase *heirs* as a word of purchase; for he says, "female as well as male;" but this could not be without breaking in upon the course

of descent. He did not, therefore, by the use of the phrase *heirs*, mean that succession of persons so denominated by the law who take in a course of descent. He must, therefore, intend to point them out particularly.

The case of *Legate v. Sewal* was a devise to his nephew L for [*476] life, and, after his decease, to the heirs male of * the body of his said nephew, to be begotten, and the heirs male of the body of every such heir male, severally and successively, as they shall be in priority of birth, &c. This case was adjudged an estate tail in the first devisee, by three judges against one. How is this case reconcilable to *Archer's case*, and *Clerk and Day*? It differs only from *Clerk and Day* in this: that the word *heirs* is *plural*. See the case of *Pawsey v. Lowdall*, in 1 Roll. Abr., where it is expressly determined that *heir* and *heirs* have the same effect. And the reason why the heir male in *Archer's case* took by purchase was, because the estate was limited over "to the heirs male of the body of such heir male." And this was the opinion of the court in the case of *Pawsey v. Lowdall*, which is directly opposed to the determination in *Legate v. Sewal*.

The case of *Bale v. Coleman*, 1 P. Wms., 142, was a devise to A and his heirs, for payment of debts, and then to A for life, with power to make leases for ninety-nine years; remainder to the heirs male of A. This was determined, by Lord COWPER, to be an estate for life; and, upon a rehearing, before Lord HARCOURT, it was determined to be an estate tail.

In the case of *Papillon and Voyce*, A devised £10,000 to trustees, in trust, to be laid out in land, to be settled on B for life, without waste; remainder to trustees, and their heirs, for the life of B, to support contingent remainders, with power to B to make a jointure; remainder to the heirs of the body of B, and remainder over. And, by the same will, lands were devised to B, to the same uses, and in the same manner. This case was heard at the Rolls, by Sir JOSEPH JEKYLL; and, upon the clear intent of the testator, he determined that B had an estate for life only in the lands, and that the money should be laid out in land, [*477] to be settled on B for life; and that his sons should take in tail male successively. * The intention to give an

estate for life was very manifest in this case, independent of his direction that he should take an estate for life only; for it was without impeachment of waste. There was a power to make a jointure; and there was a devise to trustees to support contingent remainders. It was also clear, as in any case, that the testator used the term *heirs* as *nomen collectivum*, including all the possible heirs of the body, and their heirs. Certain it is, then, that, in the opinion of the Master of the Rolls, this notwithstanding, if there was a manifest intention to give an estate for life, such estate only should pass. But this case was again heard, by Chancellor KING, on an appeal; and, so far as the judgment related to the land devised, it was reversed, and adjudged that B took an estate tail; but that, as to the money to be laid out in land, this was executory, and the intention should prevail. Why should the law make the same terms, used in different clauses in the same instrument, convey totally different ideas, when, at the same time, there is clear demonstration that he who used those terms affixed the same ideas to them in the one clause as in the other? If, in fact, the law had affixed such precise and determinate ideas to those terms as to forbid the intention to be followed, by what authority does the chancellor decree a settlement according to what he supposes to be the intention of the testator, even in part? The chancellor must have supposed that the terms, *heirs of his body*, carried with them sufficient evidence that the testator meant the same thing as first and every other son; for, otherwise, he could not have so decreed; since his avowed design, as to the money to be laid out in land, was to fulfill the intention of the testator. He must have supposed, then, that those terms were a sufficient description of those persons, viz., *first and every other son*. But the most strenuous advocates for the technical power of the terms **heirs* and *heir* agree that, when these terms are used as a description of certain persons, fairly [*478] collectible from the context, as in *Lisle and Gray*, *Waker and Snow*, they shall be taken as words of purchase. It seems that Chancellor KING supposed that the first, and every other son, were the persons pointed out, or he would not have settled the estate upon them. But if he did, how came the decree as to the lands to be reversed? For, if the words, *heirs of the body*, are

good as *descriptio personæ*, then the decree at the Rolls was perfectly right, according to the rule not disputed. But, if the words, *heirs of the body*, are not good as *descriptio personæ*, how did the chancellor find out who was described, so as to settle the purchased lands upon them? Do not the principles of this determination, as to the money to be laid out, overturn the decision as to the other part of the case, and establish a precedent that the words, *heirs of the body*, are equivalent to the *first and every other son*, which would be a sufficient description of the persons so described to take as purchasers? So Lord MANSFIELD understood those words, when he says, in the case of Perin and Blake, that "the intention of the testator was to pass an estate for life to Williams, and an inheritance to be taken successively by the heirs of his body."

Since the determination of Coulson v. Coulson, there has been determined, upon the same principles, the cases of Sayre and Masterman, and Hodgeson v. Ambrose, reported in Douglas; where the certificate from king's bench to chancery was in the words of Coulson and Coulson: from which case we shall find Lord MANSFIELD dissatisfied with the case of Coulson v. Coulson. He declares, however, he will abide by the determination of that case, though he should not so have judged. Judge BULLER seems hardly reconciled to it: he, however, considers himself [*479] bound thus to decide, upon every case which *shall be precisely the same with Coulson and Coulson; and he there considers the case of Perin and Blake as of no binding authority.

The doctrine of Hodgeson and Ambrose amounts to this: "that, where a testator uses *technical* expressions only, their technical meaning must be adopted; but where it can be sufficiently collected from the context that he means them in any other sense, his *intention* shall prevail against their technical import. And Justice BULLER seems to suppose that the decision in the case of Coulson and Coulson may be made to comport with that rule.

In the case of Jones and Morgan, reported in Brown's Chancery Cases, the doctrine of Coulson and Coulson is recognized; and the distinction between a legal and trust estate being gov-

erned by different rules of property, is considered as without foundation. Many more cases might be examined ; but the principal cases, except Robinson and Robinson, reported in Burrow, and Dodson v. Grew, in 2 Wilson, have been adverted to. As to those cases, they were determined upon their own particular circumstances.

From such jarring decisions, it is extremely difficult to determine what the law is. To the precise extent of Coulson v. Coulson, it is settled : for that case is recognized as good law, but not as a case furnishing this principle, viz., "that whenever the testator intends to use the term heirs as *nomen collectivum*, and at the same time intends that those heirs shall take by purchase, that this intention cannot be complied with ;" as is contended by Mr. Justice YATES. I understand the court in Hodgeson and Ambrose to consider it as a case which technical terms only are used ; and from which no inference could be fairly drawn, that the testator intended a life estate * merely to the first [*480] taker, and that the heir should take as purchaser.

If the case of Jones and Morgan is to be considered as settling the law upon the subject, this doctrine is established ; that whenever the testator devises to any person "in *character of heir*, he shall take in *quality of heir*," whatever the intention might be. But, that this was not the opinion of the court of king's bench, when they determined Hodgeson v. Ambrose, is sufficiently inferable, from their language in that case ; for its being the same case as Coulson v. Coulson, is the ground of the determination ; and the symptoms of disgust with the decision of Perin and Blake are very apparent in the court. It seems that, in the opinion of that court, technical meanings are to give way to the intention of the testator, whenever that intention is collectible from any quarter, other than from technical terms. As to such terms, the presumption is, that the testator, when he used them, affixed to them the ideas affixed by law. The doctrine in Jones and Morgan is, that it is immaterial what the intention of the testator is, respecting the first devisee's taking an estate for life only, and the heirs taking as purchasers. This never can be done, unless it is apparent that the testator used the term as *designatio personarum*, and not as *nomen collectivum*. The courts of law and

equity seem, by the latest authorities, to unite in rejecting any distinction between the phrase *heirs*, in a *trust*, and *legal estate*. Long and Laming, Hodgeson and Ambrose, Jones and Morgan.

Notwithstanding the difficulties that attend the construction of devises, where an estate is given to one for *life*, and to his *heirs*, or *heirs male*, &c.: yet, in the case of marriage articles, where there is a covenant to settle an estate upon one for life, and the heirs of his body, &c., upon application to have this covenant carried into *execution, chancery decrees an estate [*481] for life only, to the first taker, and an estate tail to the eldest son; with the remainder in tail to the second, third, and so on. And this is done in all cases where those terms are used, upon the declared design of carrying into execution the intention of the parties, without endeavoring to collect the intention from any thing but from the technical terms themselves. 1 P. Wms, Bale and Coleman, 142; Honor and Honor, 128; Trevor and Trevor, 612; and West and Errisey, 2 P. Wms., 849.

Is it not extraordinary, that the same terms used in a deed or will, should have an operation totally different from what they have in a covenant? In the former cases, intention is as much to be regarded, as in the latter. The construction of such words, it is said, must be presumed to be according to the technical ideas affixed to them. For every person must be supposed to know the meaning of the expression that he uses. To fulfill, therefore, his intention, the words shall be taken to mean the same thing which the law has declared that they do mean. How, then, is it affected, that the presumption respecting the same words, when used in a covenant, should not be the same? Why should we suppose, in the latter case, that the parties did not use those technical terms in their technical sense, when we are to suppose, in a deed or will, that they were used in such sense? If the rule in Shelley's case is to operate in case of a deed or will, no reason can be assigned, that it is not to operate in such covenant. Surely, the terms themselves must afford sufficient evidence to the court, that a life estate was intended to the first taker, and estate tail by purchase to the first son, &c.; or otherwise, such settlement would never have been made, when pursuing up the intention of the parties. But, if it could afford such evidences to

* the court in articles of a marriage covenant, why not in the case of a will? And if it did, there could be no [*482] question made in any of the cases mentioned in this treatise; and the rule in Shelley's case could no longer have any operation. When we find such discordant opinions respecting the operation of the rule in Shelley's case, among the most eminent characters in the English nation; such jarring decisions, not reconcilable to each other, and such a motley system, that the same words in one instrument convey ideas entirely variant from those conveyed by them in another; and that the whole controversy originated from a rule established upon feudal principles, which have long ceased in that country, and never had any existence in this; I apprehend no solid reason can be given, why we should introduce that rule into our legal system. The obvious meaning of the testator, will be found to be the real meaning. The observations that have hitherto been made, relate only to the construction of the term *heirs* where an estate of freehold was given to the ancestor, and, by the same instrument, an estate of inheritance to his heirs.

Let us now examine the operation of the terms *heir*, *issue*, &c., where a *real* or *personal chattel* is given to one and the *heirs of his body*, or to one and *his issue*. As personal estate is not descendible to heirs, but vests in an executor or administrator, it is a vain attempt to endeavor to entail it: for this would be to vary the law, and so cause a chattel to go to the heir; which is not by law permitted. Besides, as there is no way to destroy such an estate by fine or recovery, as in case of a real estate, to suffer it to be done would be to create a perpetuity. Therefore, wherever an interest in personal property is given, by words which would create an entailment of real estate, such personal property vests absolutely in the first taker, and is at his own disposal. But, as it is now * a principle admitted in the English law, that [*483] personal estate may be limited to one for life, with remainder over to another, whenever it is found that the testator used the phrase *heirs*, or *issue*, not as *nomina collectiva*, but as pointing out certain particular persons, collected from the tenor of the will: in such cases, the first taker has only an estate for life; and the person meant by the phrase, *heir* or *issue*, has after the expi-

ration of the life estate, an absolute estate therein, entirely at his disposal. But would it not better comport with the general intention of the testator, to suffer the heir to take it absolutely; and always to understand that phrase in such estates, as a word of purchase? For although the whole intention of the testator cannot be fulfilled, so that a perpetuity should take place; yet it better satisfies his intention, that the first taker should have only a life estate, and the heir the whole, than it would to divest the heir of all interest in it, and so give to the first devisee the whole property.

We have already seen, that with respect to articles of marriage agreements, where an estate was covenanted to be settled upon A, and *the heirs of his body*, that that phrase has been held, in such instrument, as a word of purchase. And when such covenant was carried into execution, the estate is limited to A for life, and to the first son in tail, and remainder over to the second son, &c. But in case of a chattel, it is not a life estate in the first son, and remainder over; but vests absolutely in such person as is intended to be marked out by the testator, by the phrase *heir*, &c. Although the rule is, that express words, which create an estate tail in real property, when applied to personal, vests the first taker with the absolute ownership; yet such words as create an estate tail by implication in real property, when applied to personal, give the first taker an estate for life only; and the person to whom it is limited over, or entailed, shall have the absolute * estate, after the expiration of the life. So that, [*484] if real and personal estate be conveyed to one by such words, the devisee will take an estate tail of inheritance, in the real estate, and an estate for life only, in the personal. As was the case of Forth and Chapman, reported in 1 P. Wms., 655, where the devise was of freehold and leasehold estate to A, for life; and if A died leaving no issue, then to B; it was determined that A took an estate tail in the freehold lands, and an estate for life in the leasehold: for in the last, he was supposed to mean by the words *leaving no issue*, leaving none at his death; but in the former he was supposed to mean, that if A died without issue generally; by which there might at any time be a failure of issue.

The acumen of astute judges is able to force these different ideas, with respect to the same words, into the minds of the testators; but to them alone are we indebted for these distinctions: they would, with deference to the opinion of grave and learned judges, have escaped the man that possessed nothing more than plain good sense and a sound understanding. When the intention of the testator was apparent to entail personal property, and when not, we shall find the same discordance of opinion among the English lawyers, in cases of personal estate as in cases of real.

Whether, in any instance, in the State of Connecticut, a devise of personal estate to one and his heirs can, upon principle, be considered as vesting the whole in the first devisee, may be considered as a question. The law of this State, with respect to a limitation of a personal estate to one for life, and remainder-over to another, is considered, I apprehend, the same with the English law. And the great reason why a limitation to one and his heirs, in the English law, is not permitted, is, the danger of establishing thereby a perpetuity. To prevent this, * the law declares that, in such case, the whole interest vests in [*485] the first devisee. But, by our law of entailments, an entailed estate vests a fee-simple in the issue of the first donee; so that all danger of a perpetuity is at an end; and, of consequence, there is no danger of indulging the intention of the testator by admitting such a limitation to be effectual to vest in the heirs the estate given. Among the numerous authorities upon this subject are, *Atkinson v. Hutcheson*, 3 P. Wms., 259; *Soltern v. Soltern*, 2 Atk., 376; *Pelham v. Gregory*, 5 Brown's Parliamentary Cases; *Theebridge v. Kilburn*, 2 Ves., 236; *Garth v. Baldwin*, 2 *ibid.*, 646, &c.; *Hodgeson v. Bussey*, 2 Atk., 89; *Seale v. Seale*, 1 P. Wms., 290; *Beauclerk v. Dormer*, 2 Atk., 812.

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II.*

OF THE MAXIM, NEMO EST HERES VIVENTIS.

WHEN an estate is given to a man and his heirs, this vests nothing in the heir. It altogether vests in the devisee, or grantee. The phrase *heirs* only serves to show the nature of the estate: that is to say, an estate that, in a course of descent, will go to his *heirs*. If, therefore, A devises an estate to B and his *heirs*, and B dies in the lifetime of the testator, the devise is lapsed; for, *nemo est heres viventis*. So, if given to the heirs of C, and C is living when the devise is to operate, that is to say, upon A's death, there is no person, according to the aforementioned maxim, to take the estate. Plowden, *Brett v. Rigden*. But if the description is such as to make it clear that the testator meant some particular person to take, this intention shall be regarded as a devise by A "to the *heir* of C, now living," whilst C was alive. *Burchell v. Durdant*, T. Raym., 830. In this case, it was plain that he meant the heir-apparent of C. And wherever the case comes up to this, that the testator intended, by the phrase *heir*, an *heir-apparent*, the devise is good, and vests in such heir-apparent by purchase. In the case of a devise to A and his *heirs*, A dies, leaving the testator: what difficulty would there be in considering the *heirs* of A as taking by purchase, upon the contingency of their ancestor's dying before the testator? And, in the case of a devise to the *heirs* of C, C being then alive, is not the presumption violent that he meant the *heir-apparent* of C? It must be so, unless we can suppose the testator whimsical enough, when he gave the estate, to intend that it should not go to any by devise, unless the ancestor of that person was dead.

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III.*

HOW FAR THE TERM HEIRS IS NECESSARY TO CONVEY AN ESTATE
OF INHERITANCE, EITHER IN A DEED OR WILL.

WE have already seen what the operation of that term is in such an instrument. I shall now consider in what cases a fee may be conveyed without the use of that term. It is a maxim, established in the English law, that, in a deed, such term is absolutely necessary to the transmission of a fee. If the conveyance is to a man and *his heirs forever*, a fee-simple is given; and those words of inheritance and perpetuity are essential in such grant. If the conveyance is to a man and the *heirs of his body*, an *estate tail* is created; and without such words of inheritance and procreation, no such estate can be created by deed. But, in wills, the absolute necessity of their use has been dispensed with, in very many instances. The governing rule is, that the *intention* of the testator is to prevail; and such construction is to be given to the words of a will as to effectuate such estate as comports with the intention of the testator, provided such intention is consistent with the rules of law; that is to say, provided the estate intended to be conveyed is such a one as the law will suffer to be given by any words whatever. In all the cases, then, upon this subject, where the proper technical terms have not been used, the question is, What is the intention of the testator? And if that is discovered to be a legal intention, it is to be complied with. Upon this ground, it is held that a devise in "fee-simple," or in "fee-tail," conveys such estate as those words import. To one and *his issue*, or one and *his seed*, conveys an *estate tail*. A devise of lands and houses, &c., to one *forever*, * without [*488] words of inheritance, conveys a fee-simple. A gift by one of houses, lands, &c., *to pay his debts*, is a *fee*; for it implies a power to sell. A devise of lands, &c., upon paying a sum in gross, gives a fee; otherwise, where such devise is to pay out of the annual profits. A devise of all my *estate*, carries with it a *fee*, as it denotes, not only the *subject*, but the *interest* in that subject. But it is said, in some authorities, that, if the devise of the estate is connected with words of *locality*, as "my estate at H," then, in such case,

an estate for *life* only passes. 3 Wils., 418; Cowp., 306; Doug., 740. We find the same doctrine laid down by Lord MANSFIELD, as settled law, that "all my estate" passes everything; but if attended with a *local* description, nothing more than an estate for *life* passes. But why is this distinction made? If "all my estate" denotes the *subject* and *quantum* of interest, how is it altered by saying, for instance, "all my estate at H."? One would imagine that the testator intended the expression to be merely restrictive to his estate in *that place*. But why should not the *subject*, and the *interest* in the subject, pass? And if my interest therein was a *fee*, what prevents a *fee* from passing? If the terms "all my estate" denote the *extent of property* that I have in the whole estate that I own in the world, why should not "all my estate at H." denote the *extent of property* that I have at H.? Notwithstanding the great authority derived to this doctrine from the declarations of Lord MANSFIELD and Chief Justice DE GRAY, yet I apprehend that the current of authorities is, that, although the phrase "estate" is connected with words descriptive of its *locality*, yet a *fee* passes. 2 Ves., 614. A devise of "my estate at A." was held to pass the *interest* in the lands, which interest being a *fee-simple*, a *fee-simple* passed. In 2 Lev., 91, there were words of *locality*, yet a *fee* passed, 2 Atk., 38; where there was a devise of "all my interest in * Kirby [489] Hall." Lord HARDWICKE held that a *fee* passed, the locality notwithstanding. The case of Ibetson v. Beckwith, there cited, is to the same purpose; it being expressly laid down that an estate *at* or *in* such a *place* may carry a *fee*. In 2 P. Wms., 524, the words, "all my estate in Upper Colesby," passed a *fee-simple*. In 1 T. Rep., 412, the word *estate* passed a *fee*. And it is laid down by Justice BULLER that it will pass a *fee* in a will, unless attended with restrictive words, which clearly manifest the intention of the testator that a *fee* should not pass. The same doctrine is maintained, 2 T. Rep., 657, &c., and that the phrase "estates," in the plural, was equivalent to the phrase "estate," in the singular. The above authorities are not reconcilable with the doctrine before laid down, respecting the operation of the word *estate*, connected with words of *locality*. The words, "all my effects, real and personal," pass a *fee*. Cowp.

209. The words, "all I am worth," pass a fee. 1 Brown's Chancery, 487. Where a man devises "all his houses, lands, farms," &c., to one, such devise is holden to convey only an estate for life; for these, of themselves, never convey more than a description of the thing, *per se*. 3 Wils., 414; Doug., 780. The same doctrine is recognized by Lord HARDWICKE, who says that a devise of "my estate in occupation of such a person," passes only a *life estate*. It must be allowed that the circumstance of pointing out that it was in the possession of a particular person, serves to show the words to be descriptive of a farm only. But where do we find any apparent intention in the testator, that the *fee* of this farm should not pass to the devisee? We find it said, in T. Rep., that, when this phrase is used, a fee must pass, unless there is an apparent intention of the testator to the contrary. Why should not a devise of "all my farm," without more words, pass a *fee-simple*? It must be admitted, that most men do not, when they *devise *real* property, think that anything can be necessary more in that case than when they devise [*490] *personal* property. When a testator gives to J. S. a horse, he has not the most distant idea that it is for the *life* of J. S.: neither is it so, but forever. Neither, in the case supposed, does he imagine he is giving his *farm* for *life*; but supposes that the same words which imply a gift *forever* of *personal* estate, also imply a gift *forever* of *real* estate. Ought it not to be presumed that the testator intended a *fee-simple* in all such cases, except where we find, from other parts of the will, that he understood how to devise *technically*? In the case of Right and Sidebotham, Doug., 730, Lord MANSFIELD says, that "all my estate" would pass a *fee-simple*; but "all my lands lying in such a place" had been considered only as descriptive of their *locality*, and an estate for *life* was given. But why do the terms, "all my estate," pass a *fee-simple*? Because, it is said, that these words convey to us the idea, not only of the *subject* given, but of the *interest* that the devisor had in the subject. If he had a *fee-simple*, it follows that a *fee-simple* was *intended* to be passed; and the *intention* is to govern, when consistent with the rules of law. But it is observable that Lord MANSFIELD says, that he had no doubt of the *intention* of the devisor to pass a *fee-simple* in that case. Why

then was it not so adjudged? It must be that the words used in that will were not such words as had been considered as sufficiently evidential of the devisor's intention. It seems, then, that although the court is clear, beyond the possibility of doubt, what the devisor's intention was, yet this intention is not to govern them, unless the evidence of such intention is derived to them through a certain set of words. When it was first established that the words, "all my estate," pass a fee-simple, these were not the legal technical words to pass a fee: how, then, came it to be so adjudged? The answer is obvious, upon *the [*491] clear *intention* of the testator that it should be so. Why, then, should it not always be thus adjudged, when the intention is equally clear? Can any solid advantage be derived to us by adopting such distinctions, unless we are satisfied that they are founded in sound sense? That the law respecting *devises* should approach much nearer to the standard of common sense than that of *deeds*, is not extraordinary; for the latter was grown into a system by the adjudications of men groping in the thick darkness of a Gothic night, and was riveted in the minds of men by the syllogistic jargon of *schoolmen*. But the law of *devises* did not commence its formation until the kindly beams of liberal science had begun to irradiate the world, when a system more conformable to the dictates of reason might be expected.

It can hardly be doubted, that, if the systems of deeds and wills had sprung up together, but that the same words would have had the same effect in a deed as in a will. Surely it is as important in the former, as in the latter, that the *intention* should be complied with; and there can be no danger of admitting this idea. The words in a will to convey a fee-simple, must be clear, such as are indicative of that *intention*, beyond a doubt. The indulgence shown to *wills*, admits of no *conjecture*; for the rule is, that the words used, must clearly demonstrate what kind of estate was intended to be given. Will not the same words in a deed, convey the same ideas with equal clearness? Does not common sense revolt at the idea that courts, whose peculiar province it is to administer *justice*, should give a construction to such words, when found in a *deed*, as is diametrically opposed to the intention of the parties, and the clear, unequivocal meaning of

the words themselves? Will the investigating mind rest satisfied with the reasons given, that in wills, the *intention* is to be regarded, when clearly expressed, although * not disfigured by a certain set of technical expressions? that a testator is often *inops consilii*? His wishes are, therefore, to be complied with, and no criminality imputed to him for not expressing himself in the language of a lawyer. But as to the man who conveys by deed, he, probably, is in sound health. Let him express his intention with ever so much perspicuity, since he has an opportunity to procure a Confessor in Technica, if he will not, they will impose the penalty upon him of thwarting his intention, and adjudge that he meant that, which they know he never intended. The warmest advocate for the galling fetters of *systems* and *precedents*, will find it difficult to convince the mind, not illuminated by legal maxims, of the propriety of giving different constructions to the same words in different instruments; when it is beyond a doubt, that the persons using them, affixed the same ideas to the words in one instrument, as they did in the other.

IV.*

[*498]

OF THE OPERATION OF THE TERM HEIRS, IN A BOND.

By the English law, the *personal estate* is the only fund for the payment of debts of deceased persons, unless the *heir* is bound by the deed of his ancestor; and in such case, the specialty creditors may resort to the heir; or rather, to the real estate of the ancestor, descended to the heir. To the payment of such debts, the heir is bound to the extent of the real estate descended from the ancestor, but is not bound to pay his *simple contract debts*. These are to be sought for no where but from the executor; who has nothing to do with the real estate, nor any control over it. However great the real estate may be, which has descended to the heir, if there is a deficiency of personal assets, such creditors must lose their debts. Our law, founded upon more equitable principles, subjects the real estate, upon the deficiency of personal estate, to the payment of all the debts of deceased persons, with-

out any distinction betwixt specialty creditors and others. The whole estate, both real and personal, is, by our law, in the hands of the executor, and subject to the payment of all debts. No additional security is therefore gained to the creditor, by binding the heir in a bond. The law has already secured to him his right of recovering his debts against the executor, to the extent of the whole estate of the deceased. He has not any occasion to resort to the heir; for before the heir can have any part of the real estate, the executor carves out to himself, as much of it as is necessary to pay the debts. It is therefore very problematical, whether, in this State, any action can be sustained against the heir, for the debt of the ancestor. But admitting that it can, in [*494] some exempt * instances; it is not because the ancestor bound the heir; but his liability, if any, arises from the equitable consideration, that he has received estate from the ancestor, and that the intervention of some cause has prevented a recovery from the executor, without any negligence in the creditor. The term *heir*, therefore, although a word of the utmost importance and signification, in an English bond, is an idle and insignificant expression with us. Would it not be best to omit it in such instruments, where it can serve no other purpose than to introduce a confusion of ideas? This, I apprehend, is commonly the case, when, through imitation, we retain a word that conveys important ideas to an English lawyer, and with us has no operation.

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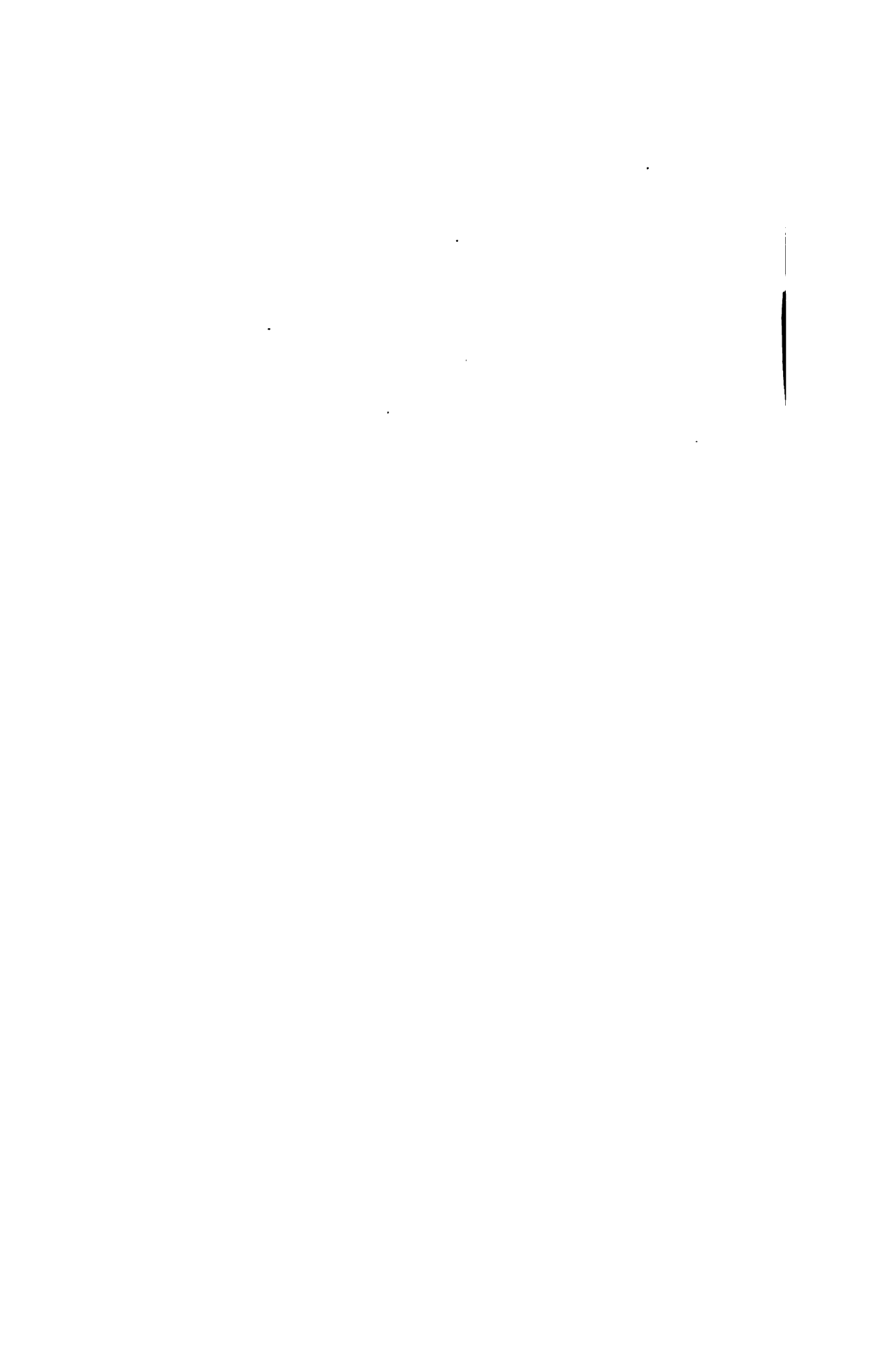
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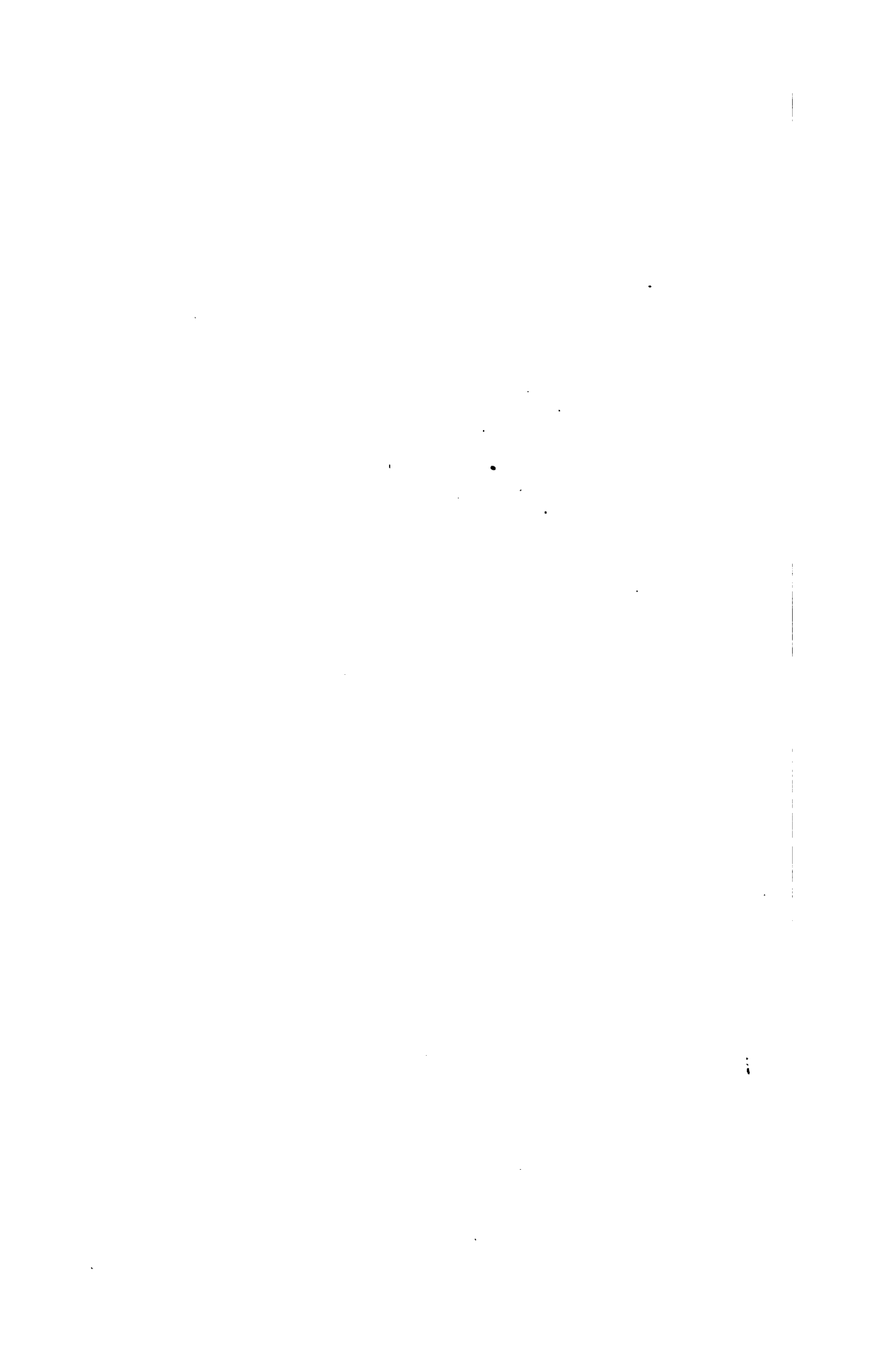
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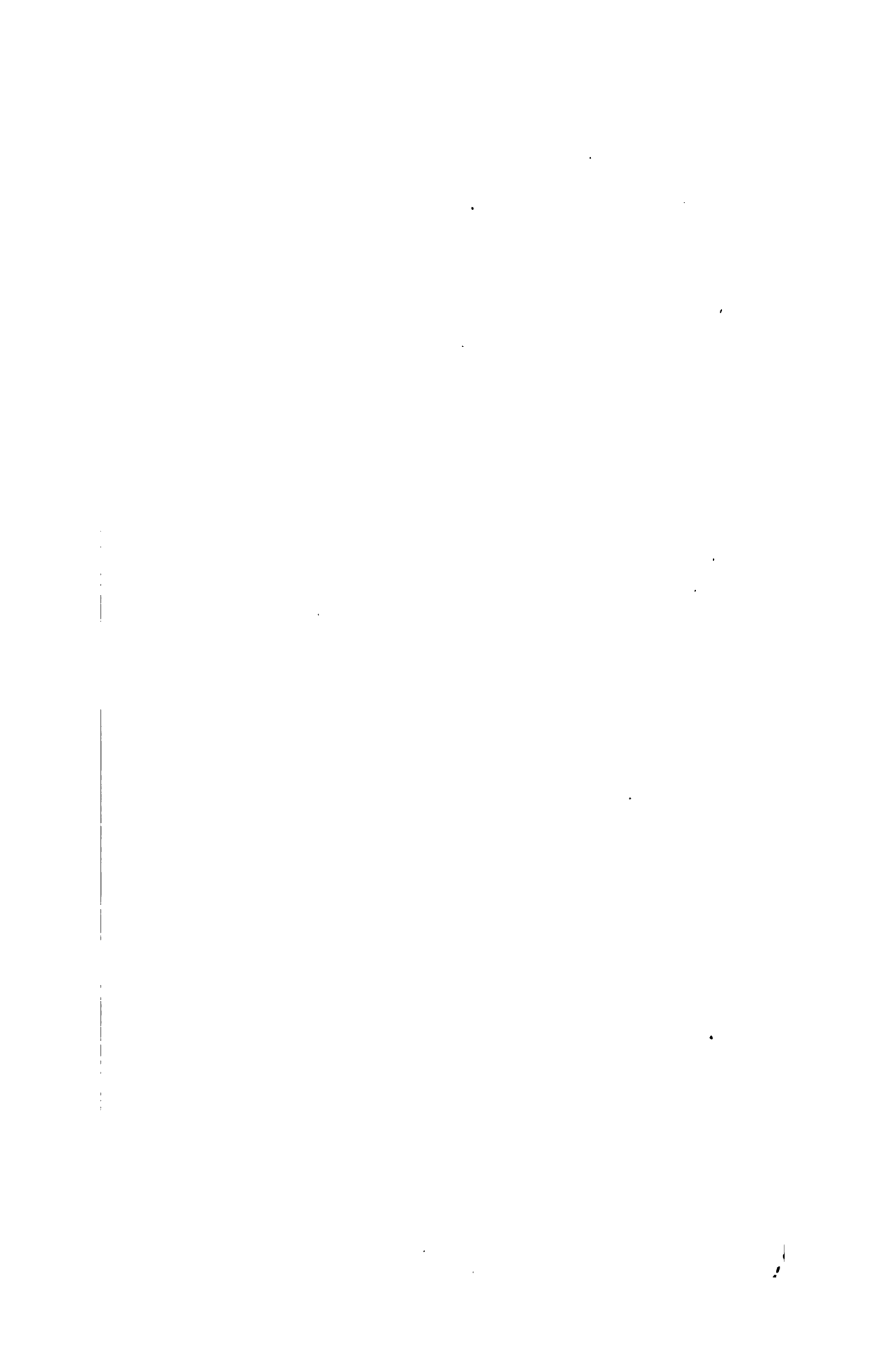


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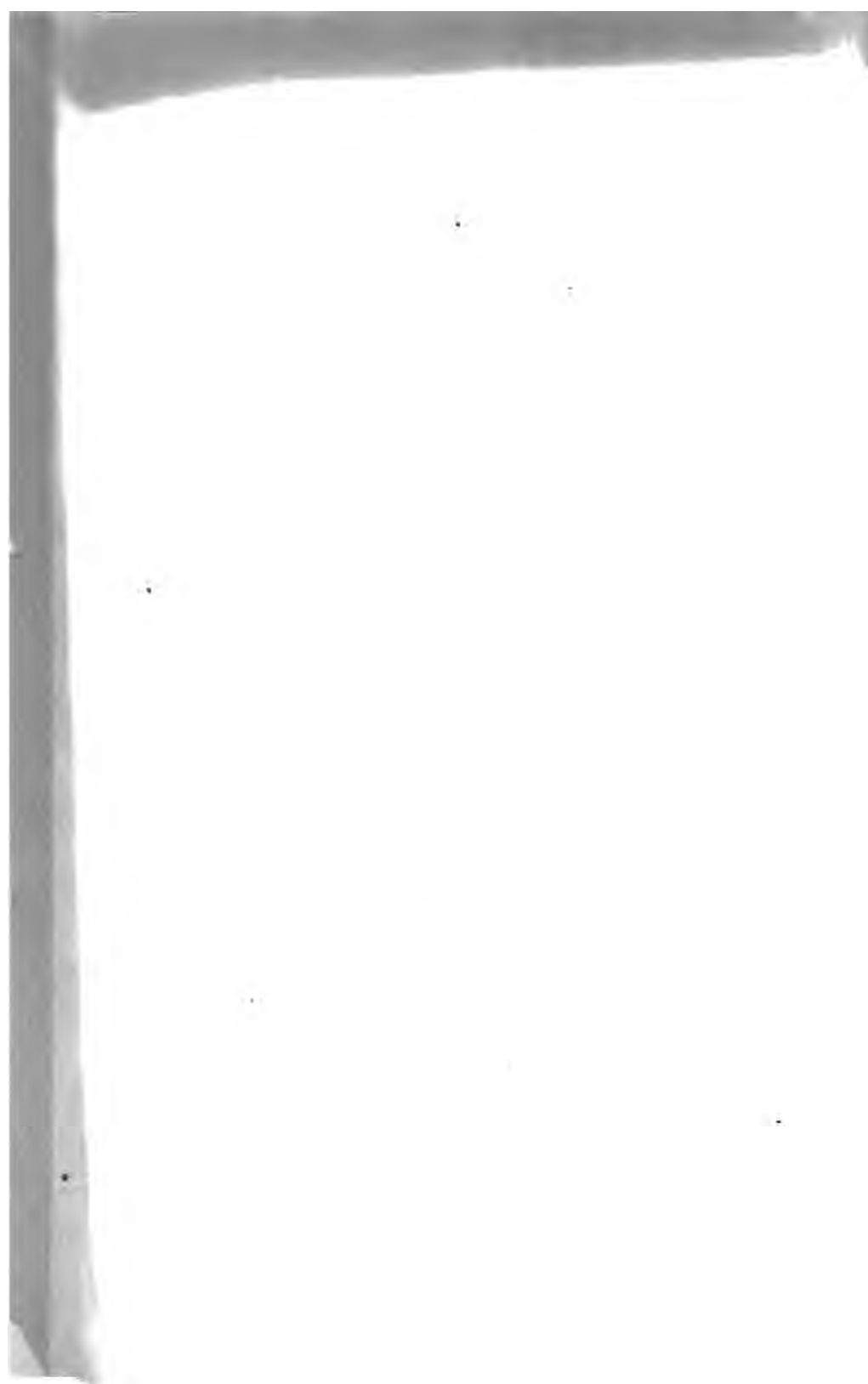


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